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In The
Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. Environmental Protection Agency (EPA) adopted its Phase II stormwater rules requiring certain local governments to obtain National Pollutant Discharge Elimination System (NPDES) permits for discharges from the local governments' municipal separate storm sewer systems (MS4s). To obtain an NPDES permit under EPA's rule, regulated local governments must adopt ordinances regulating the conduct of individuals within their jurisdictional boundaries regarding activities that could add pollutants to stormwater that might flow through the MS4 to waters of the United States. As an alternative to obtaining permits that commandeer the local governments' regulatory powers, EPA added a provision to its rule allowing local governments to seek individual permits containing indeterminable provisions that could be difficult and expensive to comply with and that might also require local governments to regulate the conduct of others.

The questions presented in this case are as follows:

1. Whether EPA, without a clear statement from Congress, is authorized to induce sovereign local governments to surrender their police powers to avoid obtaining permits containing indeterminable, but more onerous and expensive, conditions.

2. Whether the Ninth Circuit erred in interpreting EPA's rules to conclude that the Phase II stormwater rules do not commandeer the police powers of the local governments subject to the rule.

PARTIES TO THE PROCEEDING

Petitioner is the Texas Cities Coalition on Stormwater (TCCOS), an association of approximately 100 Texas municipalities. TCCOS' members are subject to EPA's Phase II stormwater regulations.

Respondents are the U.S. Environmental Protection Agency; the Natural Resources Defense Council; and the Environmental Defense Center.

CORPORATE DISCLOSURE STATEMENT

TCCOS has no parent corporations and no subsidiaries, wholly-owned or otherwise.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Texas Cities Coalition on Stormwater respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *Environmental Defense Fund v. EPA*, 344 F.3d 832 (9th Cir. 2003). App. 1-92. The initial opinion of the court of appeals, which was subsequently vacated by the court, is reported at *Environmental Defense Fund v. EPA*, 319 F.3d 398 (9th Cir. 2003). EPA's final rulemaking, which promulgated the challenged rules, is reported at 64 Fed. Reg. 68722-68851 (Dec. 8, 1999). App. 98-166 (excerpts).

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The relevant provision of the Clean Water Act (CWA), CWA § 402(p), CWA 33 U.S.C. § 1342(p) is reproduced at App. 93-97. The pertinent regulations, 40 C.F.R. §§ 122.30, 122.34 and 122.36 and excerpts from the preamble accompanying the adoption of these regulations (64 Fed. Reg. 68722-68851 (Dec. 8, 1999)) are reproduced at App. 98-181.

STATEMENT

The Ninth Circuit's holding that EPA can, without a clear statement from Congress, induce local governments to yield control of their sovereign regulatory powers in exchange for avoiding a noncommandeering alternative approach of indeterminable expense and difficulty represents a decision on an important federal question that conflicts with relevant decisions of this Court and presents an important question of federal law, with continuing nationwide significance, that has not been, but should be, settled by this Court. TCCOS does not contest that CWA grants EPA the authority to require local governments to obtain permits for their own activities that add pollutants to stormwater and ultimately to the waters of the United States. Moreover, TCCOS does not question that Congress, if it spoke directly to the issue, could offer inducements to local governments to use their police powers to further a federal regulatory program. The question here is whether Congress has directly spoken to the issue, and if not, whether EPA can offer inducements that significantly alter the traditional federal-state balance without a clear statement from Congress.

Furthermore, the Ninth Circuit erred in determining that the alternative permit option offered by EPA in 40

C.F.R. § 122.33(b)(2)(ii) does not also directly commandeer the regulatory powers of local governments. Because of this error the Ninth Circuit erroneously concluded that EPA's Phase II stormwater rules are constitutional. The Ninth Circuit's erroneous interpretation of the effect of the alternative permit option offered by EPA effectively surrenders local control of the regulatory powers of more than 35,000 municipal governments, 2,500 county governments, and more than 40,000 other local governmental bodies to the federal government. Unquestionably, EPA has the authority to regulate the activities and conduct that add pollutants to runoff. EPA could require an NPDES permit from each person that adds pollutants to the MS4, as well as to the owner/operator of the MS4 for the owner/operator's own activities that add pollutants to the MS4.[1] The Ninth Circuit's error, however, has extended EPA's reach to include the power to force local governments to regulate the activities and conduct that add pollutants to the MS4.

Pollutants in stormwater runoff are of pervasive origin. As precipitation, such as rain and snow, forms in and falls from the sky it picks up pollutants from the atmosphere such as sulfur dioxide, mercury and other pollutants emitted into the atmosphere. Once it lands on the ground, stormwater runoff picks up pollutants from everything it contacts as it travels down towards a water

[1] When it promulgated its Phase I stormwater rules, EPA expressly noted that it has "the authority to require a permit from the operator of the point source conveyance (such as a municipal storm sewer or a privately-owned treatment works), or from any person causing pollutants to be present in that conveyance and discharged through the point source, or both." 55 Fed. Reg. 47998 (Nov. 16, 1990).

body. Thus, every physical thing and every activity exposed to rainfall or runoff is a source of pollutants in runoff – air emissions, residential lawn fertilizers and pesticides, animal droppings, litter, tree detritus, brake-pad lining, and vehicle wash water to name just a few. The only way to keep pollutants out of stormwater runoff is to keep the precipitation and runoff from contacting any pollutants. The underlying issue here is whose obligation is it to regulate this conduct, when the conduct is subject to the regulatory power of both the federal and local governments.

Local governments physically cannot avoid conveying stormwater from the point where precipitation lands on the earth to the waters of the United States. As broadly defined by EPA, a MS4 consists of virtually all publicly-owned property located within the boundaries of a local government.[2] Due to the inescapable effect of gravity, precipitation falls from the sky and works its way to the lowest topographic area (usually a river, stream, or lake). This runoff will use every surface that it crosses as a conveyance to the point where it enters waters of the United States.[3] Every roof, gutter, sidewalk, curb, vacant

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[2] According to EPA, a MS4 is "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains . . . [d]esigned or used for collecting stormwater" that is "[o]wned or operated by a State, city, town, borough, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, stormwater or other wastes." 40 C.F.R. § 122.26(b)(8).

[3] Adding the complexity of EPA's scheme is the elusive nature of "the waters of the United States." *United States. v. Deaton*, 332 F.3d 698, 710-712 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3356

(Continued on following page)

lot, parking lot, street, ditch, public right-of-way, and constructed storm drain, is part of the system of conveyances used for collecting stormwater, and those parts of this system of conveyances that are owned by local governments (regardless of their primary function) are part of the MS4. Runoff cannot be physically kept out of the MS4 because the MS4 will always be located between the place where precipitation falls and the nearest water of the United States.

A. The Statutory and Regulatory Scheme

The cornerstone of the CWA, as enacted in 1972, is the regulation of the discharge of pollutants to waters of the United States through "point sources" using NPDES permits. 33 U.S.C. §§ 1341(a) and 1342. Since 1973, EPA has issued several rules in an attempt to address the appropriate regulation of stormwater runoff, and each rule has been the focus of substantial controversy. *See American*

(U.S. Nov. 10, 2003) (No. 03-701) (holding that roadside ditches are waters of the United States); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001) (holding that man-made ditches are waters of the United States); *United States v. Eidson*, 108 F.3d 1336, 1341-1343 (11th Cir. 1997) (holding that municipal storm sewers are waters of the United States). If the MS4 is part of waters of the United States and discharge of pollutants to the MS4 occur at a point source (which most do), then the question becomes what obligation does the owner of the MS4 have to obtain a permit for the subsequent conveyance of the pollutants to another water of the United States. *Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist.*, 280 F.3d 1364 (11th Cir. 2002), *cert. granted*, 123 S.Ct. 2638 (U.S. June 27, 2003) (certiorari granted on issue of whether pumping of water from one water of the United States to another such water constitutes the addition of a pollutant from a point source subject to regulation).

Mining Congress v. EPA, 965 F.2d 759, 762-763 (9th Cir. 1992). Initially, EPA promulgated NPDES permit regulations exempting uncontaminated stormwater discharges from regulation on the basis of administrative infeasibility. These regulations were challenged and set aside in *National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977), on the ground that EPA could not exempt categories of point sources from the CWA's permitting requirements. Following that decision, EPA issued proposed and final rules addressing stormwater discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts.

In 1987, Congress amended the Clean Water Act. In particular, Congress set up a new scheme for regulating stormwater runoff, Clean Water Act § 402(p); 33 U.S.C. § 1342(p), App. 93-97. Congress identified four categories of stormwater discharges for regulation in the short term: (1) discharges for which a permit had been issued before February 4, 1987; (2) discharges associated with industrial activity; (3) discharges from municipal separate storm sewer systems serving a population of 100,000 or more; and (4) discharges that contribute to violations of water quality standards or are significant contributors of pollutants to the waters of the United States. The permit program developed by EPA to address these four categories of stormwater discharges is known as EPA's Phase I stormwater program.

Congress also expressly directed EPA to conduct studies to: (1) identify those stormwater discharges or classes of stormwater discharges exempted from Phase I; (2) determine, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and (3)

establish procedures and methods to control discharges to the extent necessary to mitigate impacts on water quality. CWA § 402(p)(5), 33 U.S.C. § 1342(p)(5), App. 96. Finally, Congress directed EPA, in consultation with State and local officials, to issue regulations based on the studies to "establish a comprehensive program to regulate" the sources identified in the study. CWA § 402(p)(6), 33 U.S.C. § 1342(p)(6), App. 97. Congress directed that the program, at a minimum: (1) establish priorities; (2) establish requirements for State stormwater management programs; and (3) establish expeditious deadlines. *Id.* Congress further stated that the program could include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate. *Id.*

The comprehensive program developed by EPA, which is known as EPA's Phase II stormwater program, was adopted by EPA on December 8, 1999 (64 Fed. Reg. 68722), and is the subject of this petition. In particular, EPA's program expanded the NPDES permitting program to include stormwater discharges from municipal separate storm sewer systems serving less than 100,000 people ("small MS4s").[4] Small MS4s, by definition, are governmental entities, either local, state or Federal, having regulatory powers to control discharges to the MS4. 40 C.F.R. § 122.26(b)(8). The program automatically expanded the NPDES permit requirement to all small MS4s located in "urbanized areas" as defined by the Census Bureau, and to any other small MS4s identified by the NPDES permitting authorities (either EPA or States that

[4] EPA readily acknowledges that the CWA does not compel the use of the NPDES permit program for Phase II. 64 Fed. Reg. 68739-68741.

have been authorized to implement the NPDES program) as meeting specific designation criteria. 40 C.F.R. § 122.32. Small MS4s required to obtain NPDES permits are known as "regulated small MS4s."

EPA's regulations require regulated small MS4s to obtain NPDES permits for their stormwater discharges. 40 C.F.R. § 122.33. At a minimum, the regulations direct that any such permit require regulated small MS4s to develop, implement and enforce stormwater management programs designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. 40 C.F.R. § 122.34, App. 168-181. EPA mandated that the stormwater management programs contain the six minimum control measures specified in the regulations: (1) public education and outreach; (2) public involvement/participation; (3) illicit discharge detection and elimination; (4) construction site stormwater runoff control; (5) post-construction stormwater management in new development and redevelopment; and (6) pollution prevention/good housekeeping for municipal operations. 40 C.F.R. § 122.34(b), App. 168-177.

The six minimum measures, in part, require that the regulated small MS4 use their police powers to regulate activities within their jurisdictions, which are the actual sources of pollutants in stormwater. The following are some examples:

Illicit Discharges – Small MS4s must "effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into [their] storm sewer systems, and implement appropriate enforcement procedures and actions." 40 C.F.R. § 122.34(b)(3)(ii)(B), App.

171. Given the breadth of EPA's definition of MS4 to include municipal streets, curbs and gutters, this requirement literally requires regulated small MS4s to regulate a broad range of ordinary activities, including dog walking, lawn maintenance and charity car washes (all of which will cause "illicit discharges").

Construction Site Runoff – Small MS4s must "develop, implement, and enforce a program to reduce pollutants . . . from construction activities that result in land disturbances of greater than or equal to one acre." 40 C.F.R. § 122.34(b)(4)(i), App. 172. Specifically, the program developed by a regulated small MS4 must include "[a]n ordinance or other regulatory mechanism to require erosion and sediment controls" and procedures for site plan review and site inspection for construction sites. 40 C.F.R. § 122.34(b)(4)(ii), App. 172-173.

Post-Construction Stormwater Management – Small MS4s must use "an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment." 40 C.F.R. § 122.34(b)(5)(ii)(B), App. 174. This requirement directly affects local land-use controls. App. 175-176.

As an alternative to being forced to implement EPA's "preferred approach" (a permit containing the six minimum measures), EPA's regulations allow regulated small MS4s to submit permit applications under 40 C.F.R. § 122.26(d) (application requirements for medium and large MS4s). 40 C.F.R. § 122.33(b)(2)(ii). EPA did not include this "alternative permit option" in its proposed rule, but added it to the final rule in response to TCCOS' comments regarding the questionable constitutionality of EPA's preferred approach. Although EPA provided application requirements for the

alternative permit option in the final rule, EPA did not provide any guidance on how permit conditions would be developed for regulated small MS4s that opt for the alternative. 40 C.F.R. § 122.34(f), App. 179. Under the application requirements of 40 C.F.R. § 122.33(b)(2)(ii) (which are the application requirements of 40 C.F.R. § 122.26(d)) a small MS4 must submit a proposed management program that includes, among other requirements, "a program to implement and enforce an ordinance, orders or similar means, to prevent illicit discharges to the MS4." 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). The rule further states that the proposed programs "will be considered by [EPA] when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable." 40 C.F.R. § 122.26(d)(2)(iv). Thus, to obtain a permit under EPA's alternative permit option, a small MS4 must propose a management program, including the obligation to regulate the conduct of others, as part of the application that will be turned into permit provisions.

B. The Ninth Circuit Decision

TCCOS filed a petition for review of EPA's final action adopting the Phase II stormwater program in the Fifth Circuit in April 2000. TCCOS's petition was consolidated in the Fifth Circuit with the petition filed by the Texas Counties Stormwater Coalition. The consolidated petitions were transferred to the Ninth Circuit in June 2000 and consolidated with two other petitions for review of EPA's action.

In its petition for review, TCCOS advocated two primary positions.[5] First, TCCOS argued, based on this Court's holding in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter *S.W.A.N.C.C.*), that EPA lacked the statutory authority to compel local governments to regulate third persons because such compulsion raises serious constitutional questions altering the traditional federal-state balance and because the Act contains no clear statement that Congress intended to give EPA this power. Second, TCCOS argued, based on this Court's holding in *New York v. United States*, 505 U.S. 144 (1992), that even Congress lacks the constitutional authority to commandeer the police powers of local governments to carry out a federal program.

The Ninth Circuit denied TCCOS' petition for review, initially pursuant to an opinion and dissent entered on January 14, 2003. That opinion and dissent were vacated by the Ninth Circuit on September 15, 2003, when the court entered a new opinion and dissent and denied all petitions for rehearing and petitions for rehearing en banc. App. 3-4.

The Ninth Circuit rejected TCCOS' position that EPA lacks the statutory authority to require local governments to regulate the conduct of third persons. The court

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[5] TCCOS also raised issues regarding whether the public education minimum measure offended the First Amendment by compelling local governments to engage in political speech and whether EPA lacked the statutory authority to implement the Phase II stormwater program through the NPDES permit program. TCCOS is not seeking review of those issues.

acknowledged that the usual *Chevron*[6] deference should not be given to agency interpretations that raise significant constitutional issues, but disagreed that EPA's minimum measures presented significant constitutional questions or altered the traditional federal-state balance. App. 16 n. 18. The court based its conclusion on the presence of the alternative permit option. *Id.* The court further stated, "even if a clear statement of congressional intent were necessary, § 402(p) of the Clean Water Act is replete with clear statements that Congress intended EPA to require MS4s to either obtain NPDES permits or to stop discharging stormwater." *Id.*

The Ninth Circuit's conclusion that EPA's minimum measures approach did not present a significant constitutional question was based on the court's analysis of Congress' ultimate power under the Commerce Clause, and not on any clear statement by Congress. The court did not dispute that the minimum measures would compel local governments to regulate the conduct of third persons. App. 16-18. Instead, the court reviewed EPA's alternative permit option and concluded that it would not necessarily result in permits with commandeering provisions. Therefore, the court concluded that EPA was merely *encouraging* local governments to implement rather than *compelling* them to do so. App. 19-22. The court agreed with the holding of the Fifth Circuit in *City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003), that so long as an alternative to implementing the federal regulatory program exists and "does not offend the Constitution's

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[6] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation." App. 19-20.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision presents an issue of immense importance to our federalist concept of dual sovereignty. The court's ruling allows a federal administrative agency, without guidance or direction from Congress, to *encourage*, through the use of threats to impose more onerous provisions, the States to surrender their sovereignty. This court's decision has immeasurable consequences to the States and local governments. By allowing administrative agencies to decide on their own when and how to pressure the States into yielding their sovereignty, the Ninth Circuit has removed the protections provided by the lawmaking process against intrusive exercises of Congress' Commerce Clause powers. The court's decision creates an unprecedented device by which an agency may impose any requirements, no matter how constitutionally suspect, so long as the agency offers a constitutionally sound alternative, no matter how difficult, expensive or otherwise unappealing the alternative may be.

The Ninth Circuit's decision represents a radical departure from settled law regarding the etiquette of federalism. The court's decision conflicts with this Court's decisions relating to the power of federal administrative agencies to expand their authority in ways that upset the traditional federal-state balance.

Moreover, the court of appeals' mistaken understanding of the "alternative" provided by EPA allows EPA to directly conscript the legislative power of the States into federal service. The effect of the Ninth Circuit's error is difficult to overstate. Every municipality, county, independent school district, district, and state university in the country that is not a medium or large MS4 (more than 50,000 governmental bodies) is potentially subject to the rule, and more than 5,000 municipalities and counties located in urbanized areas are directly regulated by the rule and the Ninth Circuit's misinterpretation. Only this Court can correct the Ninth Circuit's error and provide relief for the small local governments of the nation.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS BARRING DEFERENCE TO AN AGENCY'S STATUTORY CONSTRUCTION WHERE THE AGENCY'S CONSTRUCTION ENCROACHES UPON STATE SOVEREIGNTY WITHOUT A CLEAR INDICATION THAT CONGRESS INTENDED THE RESULT

A. The Ninth Circuit's Holding That EPA Can, Without A Clear Statement From Congress, Encourage Local Governments To Yield Control Of Their Regulatory Powers Conflicts With Decisions Of This Court And Presents An Important Question Of Federal Law That Should Be Settled By This Court.

The Ninth Circuit's decision that EPA has the statutory authority to impose commandeering provisions as conditions of NPDES permits, so long as EPA provides an arguably constitutional sound alternative, presents a

novel and important issue regarding the power of federal agencies and an important federalism question with profound implications regarding the independent sovereignty of the States and their subdivisions – whether an administrative agency may *encourage* a state to waive its constitutional protection against federal commandeering, when Congress has not clearly indicated that it has empowered the agency to use such *encouragement*. The Ninth Circuit's holding represents a decision on an important federal question that conflicts with relevant decisions of this Court and presents an important question of federal law, with continuing nationwide significance, that has not been, but should be settled by this Court.

The crux of the Ninth Circuit's decision is that by adding the alternative permit option at the last minute,[7] EPA brought the Phase II program for small MS4s within the outer bounds of the scope of federal power. While not agreeing with the court's conclusion that the alternative permit option does not also commandeer the police powers of local governments, which will be explained subsequently, TCCOS' position is that the decision to put a State

[7] The alternative permit option was not included in EPA's proposed Phase II rules. 63 Fed. Reg. 1536-1643 (Jan. 9, 1998). EPA added the rule in response to TCCOS' comments that the rule as proposed would be unconstitutional because it would directly commandeer the police powers of the States. App. 153-157. EPA never intended for the alternative permit option to be used by a regulated small MS4. The application requirements do not explain how the detailed applications designed for medium and large MS4s could be tailored for small MS4s. EPA's economic and regulatory analyses do not consider the cost effects associated with the alternative permit option. In fact, EPA's analyses were based on the assumption that all regulated small MS4s would obtain a general permit based on the minimum measures approach.

to the choice of surrendering its sovereignty or not in exchange for a federal benefit is a decision that rests solely in Congress and not within an administrative agency, and that an agency cannot create that power through the interpretation of an ambiguous statute. Because Congress has not directed the States to choose between commandeering provisions or the alternative permit option, EPA lacks the authority to put the States and their local governments to such a choice.

Unquestionably, many of the provisions of EPA's Phase II rule commandeer local police powers. EPA's rule contains numerous express requirements that local governments adopt "ordinances or other regulatory measures" to regulate those subject to the local government's jurisdiction according to EPA's plans. For example, the rules require local governments to "effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges," (40 C.F.R. § 122.34(b)(3)(ii)(B), App. 171), and to adopt "an ordinance or other regulatory measure to require erosion and sediment controls, as well as sanctions to ensure compliance" (40 C.F.R. § 122.34(b)(4)(ii)(A), App. 172). Even the Ninth Circuit did not dispute the commandeering nature of these provisions.

Ultimately, the resolution of this issue depends on the scope of EPA's authority under the CWA. Ordinarily, the question of EPA's statutory authority would be decided based on the language of the statute and the traditional deference given to agency interpretations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). This is the approach used by the Ninth Circuit. App. 16 n. 18. However, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," the Court will not defer to the

agency's interpretation unless there is a clear indication that Congress intended the result. *S.W.A.N.C.C.*, 531 U.S. at 172. In *S.W.A.N.C.C.*, this Court noted that this requirement stems from the Court's prudential desire to avoid needlessly reaching constitutional issues and the Court's assumption that Congress does not casually authorize administrative agencies to "push the limit of congressional authority." *S.W.A.N.C.C.*, 531 U.S. at 172-73.[8] This rule of statutory construction is particularly heightened in situations altering the traditional federal-state balance. *S.W.A.N.C.C.*, 531 U.S. at 173. As this Court has stated, "we must be absolutely certain that Congress intended such an exercise. '[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (citations omitted). By requiring a clear statement from Congress, the Court can effectively prevent Congress from avoiding hard questions of federal-state relations and ensure that the political process properly considers the interests of the States. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also* Laurence H. Tribe, *American Constitutional Law* 86, 1009-1010 (3d ed. 2000).

This Court has made it clear that Congress may, in some instances, *encourage* the States to surrender part of

[8] As noted by the Ninth Circuit itself: "When agencies adopt a constitutionally troubling interpretation, however, we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably did not consider them at all." *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997).

their sovereignty (waive their protection from federal intrusion) in exchange for some federal benefit. *South Dakota v. Dole*, 483 U.S. 203 (1987) (conditioning receipt of federal funds on state setting minimum drinking age to federal standard); *Hodel v. Virginia Surface Min. & Recl. Ass'n, Inc.*, 452 U.S. 264 (1981) (allowing states to avoid preemption by agreeing to implement a federal program). In these instances, however, the Court has insisted on two requirements: (1) that Congress has unambiguously expressed its desire to invite the States to alter the traditional federal-state balance by accepting the federal inducement, and (2) that the state voluntarily and knowingly accepts the terms of the bargain cognizant of the consequences of their participation. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-684 (1999); *South Dakota v. Dole*, 483 U.S. at 207; *Pennhurst State Sch. & Hosp. v. Haldermann*, 451 U.S. 1, 17-18 (1981). Thus, a court should apply a "clear statement rule" to determine whether Congress intended to *encourage* the States to succumb to the federal gift and not infer such power from ambiguous statutory language.

With regard to the regulation of small MS4s specifically and to NPDES permits in general, the CWA neither authorizes EPA to impose commandeering provisions nor to force local governments to choose between implementing EPA's regulatory program or being subject to an alternative approach. Section 402(p) of the CWA authorizes EPA to establish a "comprehensive program to regulate" small MS4s. 33 U.S.C. § 1342(p)(6), App. 97. This program must, at a minimum, establish priorities, requirements for State stormwater management programs, and expeditious deadlines. *Id.* In addition, the program may include performance standards, guidelines, guidance,

and management practices and treatment requirements, as appropriate. *Id.* The permit requirements for medium and large MS4s, CWA § 402(p)(3)(B), which EPA asserts apply in this case, direct EPA to include a requirement to effectively prohibit non-stormwater discharges into the storm sewers and require controls to reduce the discharge of pollutants to the maximum extent practicable including management practices, control techniques and system, design, and engineering methods. 33 U.S.C. § 1342(p)(3)(B), App. 94-95.

Congress directed EPA to develop a comprehensive program to regulate sources of stormwater discharges not regulated by the Phase I program, and Congress knew that this program might include stormwater discharges from small MS4s owned and operated by local governments. The question is whether Congress clearly contemplated that EPA's comprehensive regulatory program might include EPA directing local governments to regulate activities that add pollutants to water ultimately discharged through the local government's drainage system. Congress' use of terms such as "performance standards, guidelines, guidance, and management practices and treatment requirements" does not indicate that Congress wanted EPA to fundamentally alter the federal-state balance by imposing commandeering provisions or to induce local governments into surrendering their sovereignty. In particular, an interpretation that Congress wanted EPA to direct local governments to impose land-use controls, such as those contained in 40 C.F.R. § 122.34(b)(5), App. 174-176, would be antithetical to Congress' expressly stated policy to "recognize, preserve and protect the primary responsibilities and rights of the States . . . to plan the development and use (including

restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

Other portions of the CWA do contain clear statements inviting the States to surrender portions of their sovereignty in exchange for a federal benefit. The provisions in the CWA cover the gamut of acceptable "cooperative federalism" techniques. Clean Water Act § 402(b) allows any state to administer its own NPDES permit program if it demonstrates to EPA that it has sufficient legal authority to carry out the program; if a state fails to adequately administer the program, EPA may revoke delegation. 33 U.S.C. § 1342(b). Clean Water Act § 319 requires the States to prepare nonpoint source management programs, including regulatory programs to implement best management practices to reduce pollutant loadings resulting from nonpoint sources; if a state fails to submit a plan or if EPA disapproves the state's plan, EPA must prepare a report for the state that identifies water quality problems caused by nonpoint sources and report to Congress regarding EPA's actions. 33 U.S.C. § 1329. Clean Water Act § 204(b) requires that a local government, as a condition of obtaining funds to construct treatment works, adopt a system of charges other than *ad valorem* taxes to fund treatment plant operation and maintenance costs; if a local government refuses to alter its funding method, the local government will not receive federal funds. 33 U.S.C. § 1284(b).

In the Phase II rule, what EPA offers to local governments is the option of implementing a federal regulatory program through the terms of a general permit to avoid being held responsible for the pollution causing activities of others through the provisions of an individual permit. *See* 64 Fed. Reg. 68765-68766, App. 156-157 ("The operator of a

small MS4 that does not prohibit and/or control discharges into its system essentially accepts "title" for those discharges."). In the vernacular of cooperative federalism, EPA's permitting scheme (either accept a general permit with the commandeering provisions or apply for an alternative individual permit) can best be analogized to a delegation program; that is, a program through which the States can be delegated the authority to implement a federal regulatory program (the federal benefit) to avoid being preempted altogether from the regulatory field. Just as the Court would not allow EPA to create a delegation program without a clear statement from Congress, the Court should not allow EPA to create the program presented in the Phase II rule.

In a case involving the permit requirements for medium and large MS4s, the Fifth Circuit, held that EPA has the statutory authority to impose commandeering provisions pursuant to CWA § 402(p)(3)(B), App. 94-95. *City of Abilene v. EPA*, 325 F.3d 657, 660-661 (5th Cir. 2003). The Fifth Circuit relies upon the language of the statute that medium and large MS4 permits contain "*such other provisions as the Administrator . . . determines appropriate to control of such pollutants.*" *Id.* The Fifth Circuit's holding is not directly applicable here because it relates solely to the permit requirements for medium and large MS4s. Moreover, the Fifth Circuit's analysis is clearly wrong. As illustrated by CWA § 319, which directs the States to develop regulatory or nonregulatory best management practices to control nonpoint source pollution, Congress knows how to direct the States to use their "regulatory" powers. Moreover, the scope of "provisions" available to EPA cannot include the power to directly commandeer local police powers without violating the anti-commandeering principles

laid down in *New York v. United States*, 505 U.S. 144 (1992). *See also Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977), *aff'd*, 566 F.2d 665 (9th Cir. 1977) (vacated as moot after EPA withdrew the challenged rule). In *Brown*, the Ninth Circuit court found the presence of these cooperative federalism techniques to be incompatible with the view that buried within the statute were provisions that would allow EPA to merely conscript the States. *Id.*

The Ninth Circuit's deference to EPA's construction that it is authorized to *encourage* local governments to yield their police powers to federal control conflicts with this Court's holding in *S.W.A.N.C.C.* Rather than first asking whether EPA's specific interpretation invokes the outer limits of Congress' power, the court jumped straight to resolving whether Congress itself could propose such *encouragement*. The problem with the court's analysis is, by directly addressing the ultimate bounds of Congressional power without looking to see if Congress directly addressed the issue, the court failed to ensure the efficacy of the procedural political safeguards that were the focus of this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). The ultimate question is not whether the provision of the alternative brings EPA's commandeering provisions into the outer limits of federal power; rather the ultimate question whether Congress itself, and not some administrative agency, has properly considered the effects of that action.

The effect of the Ninth Circuit's decision, simply put, is circumvention of all federalism protections for the States in those situations where the States engage in conduct subject to the outer boundaries of Congress'

Commerce Clause powers (such as when local governments allow stormwater runoff to flow down their streets and empty into a natural watercourse). The pernicious effect of the court's opinion is that the decision whether to nullify the States' federalism protections will be made solely by federal agencies without direction from Congress. To impose any condition upon the States, no matter how constitutionally suspect, all an agency need do is provide an alternative that does not offend the Constitution's guarantees of federalism, no matter how "difficult, expensive or otherwise unappealing" the alternative. App. 19-20. Under the Ninth Circuit's rationale, EPA could permissibly demand that local governments stop discharging stormwater altogether,[9] or that local governments actively promote the campaigns of pro-environment candidates, both of which might fit within the maximum extent practicable standard articulated by Congress.[10] Clearly, Congress did not intend to allow an agency to boundlessly expand its statutory authority by bootstrapping off of its clear authority. Just because Congress empowered an agency to do X, does not mean that Congress empowered the agency to do Y or Z, so long as the agency offers X as an alternative to doing Y or Z. In situations not implicating federalism, a court might defer under *Chevron* to the agency's interpretation that Y

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[9] The Ninth Circuit hints at a third option available to small MS4s that raises no federalism concerns – the no discharge option. As TCCOS argued before the court, no small MS4 can avoid discharging stormwater through its storm sewers. Water flows down hill.

[10] The text of the Ninth Circuit decision appears to suggest that EPA could also avoid the constriction of the maximum extent practicable standard so long as EPA promulgates at least one approach meeting the standard. App. 19-20.

and Z are permissible, but where Y or Z raise federalism or other serious constitutional issues, a court should not defer to the agency's interpretation.

The Ninth Circuit's decision marks a profound shift in the balance of power from the States to the federal administrative agencies. Under the decision, the States lose the structural protections from excess federal intrusion provided by *Gregory v. Ashcroft*. Under the decision, administrative agencies can radically alter the balance of power based solely on ambiguous delegations of power from Congress. This Court should review the court of appeals' decision and determine whether such an alteration in the federal-state balance is appropriate.

B. The Ninth Circuit's Holding That EPA Has The Authority To Encourage Local Governments to Surrender Their Regulatory Powers Or Comply With Indeterminable Permit Provisions Is A Decision On An Important Federal Question That Conflicts With Decisions Of This Court And Presents An Important Question of Federal Law That Should Be Settled By This Court.

Assuming, *arguendo*, that EPA has the authority to force local governments to choose between regulating others or having to obtain some other form of permit, The Ninth Circuit's holding, which clearly encourages local governments to strike a Faustian bargain (*i.e.*, one that encourages local governments to bargain away their souls to gain a short-term advantage), conflicts with this Court's precedents mandating that a State make an informed choice when striking a bargain with the federal government and presents an important question of federal law,

with continuing nationwide significance, that has not been, but should be, settled by this Court.

When Congress invites the States to accept federal funds, waive their Eleventh Amendment protections, or avoid preemption, Congress must do so in a manner that ensures that the States voluntarily and knowingly accept the terms of the bargain cognizant of the consequences of their participation. *College Sav. Bank*, 527 U.S. at 680-684; *South Dakota v. Dole*, 483 U.S. at 207; *Pennhurst State Sch. & Hosp. v. Haldermann*, 41 U.S. at 17-18. EPA's alternative permit option is an offer to allow local governments to use their police powers to implement EPA's program in exchange for avoiding some more onerous, but indeterminable, permit provision. In other words, EPA's offer fails to provide sufficient notice of the terms of the bargain because it fails to fully inform the States of the terms of the alternative permit option.

The only description offered by EPA of this alternative permit option is found in the preamble to EPA's final Phase II rule. 64 Fed. Reg. 68785-86, App. 152-160. This description provides little substantive information regarding what might be required in such a permit. EPA states that effluent limits in such permits might be set using "equivalency" determinations, but EPA admits that the limits set through such determinations will have a wide range because of the lack of information regarding such discharges. App. 158-159. As EPA candidly states, "[p]ermit writers will undoubtedly find ways to ensure that permit limits ensure reduction of pollutants to the maximum extent practicable." App. 159. Since the promulgation of the rule in 1999, EPA has issued no guidance explaining how permit terms for such permits should be determined. At the time small MS4s decide whether to

succumb to EPA's offer, they have no way of knowing how much more onerous the alternative permit option will be than EPA's minimum measures approach. Granted, EPA's description of the alternative permit option clearly implies that the approach will be far more onerous than the minimum measures approach, but EPA's description looks more like euphemistic *encouragement* than an objective explanation of the alternative. EPA's approach ensures that small MS4s have no way of making an informed choice.

The Ninth Circuit's decision gives federal administrative agencies the power, without any clear authorization from Congress, to bully local governments into surrendering their regulatory powers to avoid the imposition of the most difficult and expensive (but arguable constitutional) alternative within the imagination of an agency. By depriving local governments of the ability to make an informed choice, EPA deprived the local governments of the ability to make a choice; EPA's encouragement became coercion. Given the choice between regulating in accordance with EPA's mandates or pursuing an option of indeterminable cost and difficulty, only those elected officials truly committed to the Constitution at any cost would pursue the alternative. On this basis as well, the Ninth Circuit's decision marks a profound shift in the balance of power from the States to federal agencies. This Court should review the court of appeals' decision and determine whether such an alteration in the federal-state balance is appropriate.

II. THE NINTH CIRCUIT ERRED IN DETERMINING THAT THE ALTERNATIVE PERMIT OPTION WOULD NOT COMMANDEER LOCAL POLICE POWERS

The Ninth Circuit's conclusion that the alternative permit option does not require a small MS4 to implement a federal regulatory program in order to receive a permit, App. 20-22, is flawed. The alternative permit option unquestionably requires small MS4s to obtain permits with conditions forcing small MS4s to regulate the conduct of others. Since both of EPA's options, the minimum measures option and the alternative permit option, force local governments to regulate others, EPA's rules violate the anti-commandeering rule laid down by this Court in *New York*. The Court should review the court of appeals' decision and correct this obvious mistake, which potentially affects more than 50,000 State and local governmental entities in the nation.

EPA's alternative permit option allows a small MS4 to seek authorization to discharge under an individual permit by complying with the provisions of 40 C.F.R. § 122.26(d), except for the information required by §§ 122.26(d)(1)(ii) and (d)(2) regarding legal authority. 40 C.F.R. § 122.33(b)(2)(ii). Under 40 C.F.R. § 122.26(d), however, a small MS4 must, as part of its permit application, submit a proposed management program that includes provisions regulating those subject to the small MS4s' regulatory powers. One example is the requirement to implement and enforce an ordinance, orders or similar means, to prevent illicit discharges to the MS4. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). The only conclusion that can logically be drawn from this application requirement is that final permits will incorporate the proposed programs.

Local governments will not be free to simply not propose the programs, because EPA's rules direct EPA to only review applications that are complete, and if local governments refuse to submit required portions of applications, the applications will be denied. 40 C.F.R. § 124.3(c). That the final permit will incorporate the proposed management programs is clearly demonstrated in other EPA rules addressing applications submitted under 40 C.F.R. § 122.26(d), which require the permittee to annually report on the status of, and changes to "the components of the stormwater management program that are established as permit conditions. 40 C.F.R. § 122.42(c).

In the preamble to the final Phase II rule, EPA offers no explanation of how a local government will be able to submit an application for permit, which must contain regulatory programs, and ensure that those regulatory programs will not be incorporated into the NPDES permit.[11] Instead, EPA purposefully obscures what permits issued under this alternative approach will contain by stating that the alternative "provides for greater flexibility in program implementation" and gives a local government "the option to seek an individual permit that varies from the minimum measures/management approach that is

[11] The vagueness of EPA's alternative permit option could have been addressed at the administrative level if EPA had included this option in its proposed rule and TCCOS had the opportunity to comment on the approach. TCCOS unsuccessfully asserted before the Ninth Circuit that EPA failed to comply with the minimum notice and comment procedures of the APA. App. 27-29. EPA should not be allowed to argue now that its alternative permit option is sufficiently clear regarding the ability of local governments to avoid regulating others when TCCOS was denied the opportunity to comment on EPA's approach in the rulemaking.

otherwise specified." App. 157. However, EPA nowhere denies that the submission of a complete application would not result in commandeering provisions being included in the permit.

The Ninth Circuit's analysis of 40 C.F.R. § 122.33(b)(2)(ii) is likewise uninformative. The court merely restates the obvious, that § 122.26(d) does not require small MS4s to regulate the conduct of others because § 122.26(d) is merely an application requirement. The court's only attempt to explain that the permit ultimately issued based on these application requirements will not require the regulation of others is by relying on the Fifth Circuit's decision in *City of Abilene*. The court's reliance on *City of Abilene* to support its proposition is misplaced. A review of that case reveals the NPDES permits at issue contained conditions requiring the affected local governments to regulate the conduct of others. *City of Abilene*, 325 F.3d at 662-63. The case does not stand for the proposition that EPA could lawfully issue a permit without such conditions. Later in the opinion, App. 33 n. 31, the Ninth Circuit recognizes that it previously relied on EPA's position that "inadequate proposals will result in the denial of permit applications" in *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292 (9th Cir. 1992). In the prior case, the Ninth Circuit held that permit application requirements of § 122.26(d) provided sufficient guidance because "[a]pplicants *must submit* information on source control methods." *NRDC v. EPA*, 966 F.2d at 1308 n. 17. In other words, the Ninth Circuit previously held that permits written based on the permit application requirements of § 122.26(d) would contain commandeering provisions because such requirements

would be based on the plans submitted by applicants, which would necessarily contain such provisions.

The Ninth Circuit's error in construing the requirements of 40 C.F.R. § 122.33(b)(2)(ii) caused the Ninth Circuit to misapply *S.W.A.N.C.C.* and the Court's anti-commandeering rule. Because both the minimum measures option and the alternative permit option require local governments to regulate the conduct of those subject to their control, EPA's interpretation that it has the authority to require these provisions clearly raises significant federalism issues (and demonstrates a constitutional violation). The Ninth Circuit erred in deferring to EPA's construction of the statute. This Court should grant certiorari to correct this error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL DEFENSE CENTER, INC., *Petitioner,* NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioner-Intervenor,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	No. 00-70014 EPA No. Clean Water 40 CFR
AMERICAN FOREST & PAPER ASSOCIATION; NATIONAL ASSOCIATION OF HOME BUILDERS, *Petitioner,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent,* NATURAL RESOURCES DEFENSE COUNCIL, INC., *Applicant-Intervenor.*	No. 00-70734 EPA No. Clean Water 40 CFR

TEXAS CITIES COALITION ON STORMWATER; TEXAS COUNTIES STORM WATER COALITION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Respondent-Intervenor.

No. 00-70822
EPA No.

Clean Water 40 CFR

ORDER AND OPINION

On Petition for Review of an Order of the Environmental Protection Agency

Argued and Submitted
December 3, 2001 – Pasadena, California

Filed September 15, 2003

Before: James R. Browning, Stephen Reinhardt, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Browning; Partial Concurrence and Partial Dissent by Judge Tallman

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ORDER

The opinion and dissent filed in this case on January 14, 2003, and published at 319 F.3d 398 are vacated. They are replaced by the Opinion and Dissent filed today.

With the filing of the new Opinion and Dissent, the panel has voted to deny the petitions for rehearing and the petition for rehearing en banc. (Judge Tallman would

grant the petition for rehearing filed by the Environmental Protection Agency.) The full court has been advised of the new Opinion, new Dissent, and petition for rehearing en banc. No judge has requested a vote on the petition for rehearing en banc. Fed. R.App. P. 35.

The petitions for rehearing and the petition for rehearing en banc are DENIED. The clerk is instructed not to accept for filing any new petitions for rehearing or petitions for rehearing en banc in this case.

Each party shall bear its own costs in this appeal.

OPINION

BROWNING, Circuit Judge:

Petitioners challenge a rule issued by the United States Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. §§ 1251-1387, to control pollutants introduced into the nation's waters by storm sewers.

Storm sewers drain rainwater and melted snow from developed areas into water bodies that can handle the excess flow. Draining stormwater picks up a variety of contaminants as it filters through soil and over pavement on its way to sewers. Sewers are also used on occasion as an easy (if illicit) means for the direct discharge of unwanted contaminants. Since storm sewer systems generally channel collected runoff into federally protected water bodies, they are subject to the controls of the Clean Water Act.

In October of 1999, after thirteen years in process, the Environmental Protection Agency ("EPA") promulgated a

final administrative rule (the "Phase II Rule"[1] or "the Rule") under § 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), mandating that discharges from small municipal separate storm sewer systems and from construction sites between one and five acres in size be subject to the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. §§ 1311(a), 1342. EPA preserved authority to regulate other harmful stormwater discharges in the future.

In the three cases consolidated here, petitioners and intervenors challenge the Phase II Rule on twenty-two constitutional, statutory, and procedural grounds. We remand three aspects of the Rule concerning the issuance of notices of intent under the Rule's general permitting scheme, and a fourth aspect concerning the regulation of forest roads. We affirm the Rule against all other challenges.

I.

BACKGROUND

A. The Problem of Stormwater Runoff

Stormwater runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial

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[1] The "Phase II Rule" reviewed here is the product of the second stage of EPA's two-phase stormwater rulemaking effort. The "Phase I Rule," governing larger-scale stormwater discharges, was issued in 1990 and reviewed by this court in *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992).

and sewage sources."[2] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States.[3] In 1985, three-quarters of the States cited urban stormwater runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment.[4] Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters.[5] Among the sources of stormwater contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[6]

B. Stormwater and the Clean Water Act

Congress enacted the Clean Water Act in 1948 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (originally codified as the Federal Water Pollution Control Act, 62 Stat. 1155). The Clean Water Act prohibits the

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[2] Richard G. Cohn-Lee and Diane M. Cameron, *Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation,* THE ENVIRONMENTAL PROFESSIONAL, Vol. 14, p. 10, at 10 (1992); *see also Natural Res. Def. Council,* 966 F.2d at 1295 (citing a study by the Nationwide Urban Runoff Program).

[3] Regulation for Revision of the Water Pollution Control Program Addressing Storm Water, 64 Fed. Reg. 68,722, 68,724, 68,727 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124).

[4] *Id.* at 68,726.

[5] *Id.*

[6] *Id.* at 68,725-31.

discharge of pollutants from a "point source"[7] into the waters of the United States without a permit issued under the terms of the National Pollutant Discharge Elimination System, 33 U.S.C. §§ 1311(a), 1342, which requires dischargers to comply with technology-based pollution limitations (generally according to the "best available technology economically achievable," or "BAT" standard). 33 U.S.C. § 1311(b)(2)(A). NPDES permits are issued by EPA or by States that have been authorized by EPA to act as NPDES permitting authorities. 33 U.S.C. § 1342(a)-(b). The permitting authority must make copies of all NPDES permits and permit applications available to the public, 33 U.S.C. §§ 1342(j), 1342(b)(3); state permitting authorities must provide EPA notice of each permit application, 33 U.S.C. § 1342(b)(4); and a permitting authority must provide an opportunity for a public hearing before issuing any permit, 33 U.S.C. §§ 1342(a)(1), 1342(b)(3); *cf.* 33 U.S.C. § 1251(e) (requiring public participation).

Storm sewers are established point sources subject to NPDES permitting requirements. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1379 (D.C. Cir. 1977) (holding unlawful EPA's exemption of stormwater discharges from NPDES permitting requirements); *Natural Res. Def. Council v. EPA,* 966 F.2d 1292, 1295 (9th Cir. 1992).[8] In 1987, to better regulate pollution conveyed by

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[7] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[8] Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject

(Continued on following page)

stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation. *Id.* at § 1342(p)(2)-(4); *Natural Res. Def. Council,* 966 F.2d at 1296. In 1990, pursuant to § 402(p)(4), EPA issued the Phase I Rule regulating large discharge sources.[9]

C. The Phase II Stormwater Rule

In Clean Water Act § 402(p), Congress also directed a second stage of stormwater regulation by ordering EPA to identify and address sources of pollution not covered by the Phase I Rule. Section 402(p)(1) placed a temporary moratorium (expiring in 1994) on the permitting of other stormwater discharges pending the results of studies mandated in § 402(p)(5) to identify the sources and pollutant

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to federal regulation. *Oregon Natural Desert Ass'n v. Dombeck,* 172 F.3d 1092, 1095 (9th Cir. 1998).

[9] National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pt. 122-124). The Phase I rule was challenged in this court in *Natural Res. Def. Council,* 966 F.2d at 1292. We held, *inter alia,* that EPA must impose deadlines for permit approvals, *id.* at 1300, that EPA's decision to regulate construction sites only over five acres in size was arbitrary and capricious, *id.* at 1306, and that EPA did not act capriciously in defining "municipal," *id.* at 1304, or in placing differently-sized municipalities on different permitting schedules, *id.* at 1301.

content of such discharges and to establish procedures and methods to control them as "necessary to mitigate impacts on water quality." 33 U.S.C. § 1342(p)(5). Section 402(p)(6) required that EPA establish "a comprehensive program to regulate" these stormwater discharges "to protect water quality," following the studies mandated in § 402(p)(5) and consultation with state and local officials. *Id.* at § 1342(p)(6).

EPA proposed the Phase II Rule in January of 1998.[10] In October, 1999, Congress passed legislation precluding EPA from promulgating the new Rule until EPA submitted an additional report to Congress supporting certain anticipated aspects of the Rule.[11] EPA was also required to publish its report in the Federal Register for public comment. Pub. L. No. 106-74, § 431(c), 113 Stat. at 1097. Later that month, EPA submitted the required ("Appropriations Act") study and promulgated the Rule.[12]

Under the Phase II Rule, NPDES permits are required for discharges from small municipal separate storm sewer systems ("small MS4s") and stormwater discharges from construction activity disturbing between one and five acres ("small construction sites"). 40 C.F.R. §§ 122.26(a)(9)(i)(A)-(B).

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[10] Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 (proposed Jan. 9, 1998).

[11] Pub. L. No. 106-74, § 431(a), 113 Stat. 1047, 1096 (1999) ("Appropriations, 2000 – Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies").

[12] Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124).

Small MS4s may seek permission to discharge by submitting an individualized set of best- management plans in six specified categories, *id.* at § 122.34, either in the form of an individual permit application, or in the form of a notice of intent to comply with a general permit. *Id.* at § 122.33(b). Small MS4s may also seek permission to discharge through an alternative process, under which a permit may be sought without requiring the operator to regulate third parties, *id.* at §§ 122.33(b)(2)(ii), 122.26(d).[13] Small construction sites may apply for individual NPDES permits or seek coverage under a promulgated general permit. *Id.* at § 122.26(c). EPA also preserved authority to regulate other categories of harmful stormwater discharges on a regional, as-needed basis. *Id.* at § 122.26(a)(9)(i)(C)-(D).

D. Facial Challenges to the Phase II Rule

The Rule was challenged in the Fifth, Ninth, and D.C. Circuits in three separate actions ultimately consolidated before the Ninth Circuit.

The Texas Cities Coalition on Stormwater and the Texas Counties Stormwater Coalition (collectively, "the Municipal Petitioners") assert that EPA lacked authority to require permitting, that its promulgation of the Rule was procedurally defective, that the Rule establishes categories that are arbitrary and capricious, and that the Rule impermissibly requires municipalities to regulate

[13] The Rule also allows a small MS4 to be regulated under an individual NPDES permit covering a nearby large or medium MS4, with provisions adapted to address the small MS4. 40 C.F.R. § 122.33(b)(3).

their own citizens in contravention of the Tenth Amendment and to communicate a federally mandated message in contravention of the First Amendment. The Natural Resources Defense Council ("NRDC") intervened on behalf of EPA.

Environmental Defense Center, joined by petitioner-intervenor NRDC ("the Environmental Petitioners"), asserts that the regulations fail to meet minimum Clean Water Act statutory requirements because they constitute a program of impermissible self-regulation, fail to provide required avenues of public participation, and neglect to address stormwater runoff associated with forest roads and other significant sources of runoff pollution.

The American Forest & Paper Association ("AF&PA") and the National Association of Home Builders ("the Industrial Petitioners") assert that promulgation of the Rule was procedurally defective and violated the Regulatory Flexibility Act, that EPA's retention of authority to regulate future sources of runoff pollution is *ultra vires,* and that the decision to regulate discharge from construction sites one to five acres in size is arbitrary and capricious. NRDC again intervened on behalf of EPA.

We have jurisdiction pursuant to section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1) (assigning review of EPA effluent and permitting regulations to the Federal Courts of Appeals).

II.

DISCUSSION

A. The Permit Requirements

The Municipal Petitioners' primary contention is that the Phase II Rule compels small MS4s to regulate citizens as a condition of receiving a permit to operate, and that EPA lacks both statutory and constitutional authority to impose such a requirement. Because we avoid considering constitutionality if an issue may be resolved on narrower grounds, *Greater New Orleans Broadcasting Ass'n v. United States,* 527 U.S. 173, 184 (1999), we first ask whether the Phase II Rule is supported by statutory authority.

1. Statutory Authority

The Municipal Petitioners assert that the statutory command in Clean Water Act § 402(p)(6) that EPA develop a "comprehensive program to regulate" small MS4s did not authorize a program based on NPDES permits. Petitioners argue that because § 402(p)(6) explicitly indicates elements that the program may contain (performance standards, guidelines, etc.) without mentioning "permits," Congress must have intended that the program exclude permitting.[14]

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[14] The text of that section reads: "Not later than October 1, 1993, [EPA], in consultation with state and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such

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The fact that "permitting" is not included on a statutory list of elements that the program "may" include is not determinative, because the list is manifestly nonexclusive. The only constraints are that the § 402(p)(6) regulations be based on the § 402(p)(5) studies, that they be issued in consultation with state and local officials, and that – "at a minimum" – they establish priorities, requirements for state stormwater management programs, and expeditious deadlines, and constitute a comprehensive program "to protect water quality." 33 U.S.C. § 1342(p)(6). EPA was free to adopt any regulatory program, including a permitting program, that included these elements. *See Chevron, U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 842-43 (1984) (deference to an agency's reasonable interpretation is required unless Congress expressed its intent unambiguously). It is more reasonable to interpret congressional silence about permits as an indication of EPA's flexibility not to use them than as an outright prohibition.[15]

The Municipal Petitioners further contend that their interpretation is supported by the structure of § 402(p), which expressly requires permits for large and medium sized MS4s in a separate section, § 402(p)(3)(B).[16] However,

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designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. § 1342(p)(6).

[15] The lesser category of "permits" may also be implied by the inclusion of "performance standards" in the list of possible program features.

[16] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

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as EPA counters, the language in § 402(p)(3) requiring permits for municipal storm sewers may be interpreted to apply both to Phase I *and* Phase II MS4s. Moreover, as respondent-intervenor NRDC notes, the mere existence of the § 402(p)(1) permitting moratorium, designed to apply only to Phase II dischargers, necessarily implies that EPA has the authority to require permits from these sources after the 1994 expiration of the moratorium.

Since there would have been no need to establish a permitting moratorium for these sources if the sources could *never* be subject to permitting requirements, petitioners' interpretation violates the bedrock principle that statutes not be interpreted to render any provision superfluous. *See Burrey v. Pacific Gas & Elec. Co.,* 159 F.3d 388, 394 (9th Cir. 1998). EPA's interpretation of its mandate under § 402(p)(6) was reasonable and EPA acted within its statutory authority in formulating the Phase II Rule as a permitting program.

2. The Tenth Amendment

The Municipal Petitioners contend that the Phase II Rule on its face compels operators of small MS4s to regulate third parties in contravention of the Tenth Amendment. We conclude that the Rule does not violate the Tenth Amendment, because it directs no unconstitutional coercion.

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presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States,* 522 U.S. 23, 29-30 (1997).

The Phase II Rule contemplates several avenues through which a small MS4 may obtain permission to discharge. First, if the NPDES Permitting Authority overseeing the small MS4 has issued an applicable general permit, the small MS4 may submit a notice of intent wherein the small MS4 agrees to comply with the terms of the general permit and specifies plans for implementing six "Minimum Measures" designed to protect water quality. 40 C.F.R. §§ 122.33(b)(1), 122.34(d)(1)(i), 122.34(b). Second, the small MS4 may apply for an individual permit under 40 C.F.R. § 122.34, which would again require compliance with the six Minimum Measures. *Id.* at §§ 122.33(b)(2)(i), 122.34(a), 122.34(b). Third, under an "Alternative Permit" option, the small MS4 may apply for an individualized permit under 40 C.F.R. § 122.26(d), the permitting program established by the Phase I Rule for large and medium-sized MS4s. *Id.* at §§ 122.33(b)(2)(ii), 122.26(d).[17]

The Minimum Measures mentioned above require small MS4s to implement programs for: (1) conducting public education and outreach on stormwater impacts, *id.* at § 122.34(b)(1); (2) engaging public participation in the development of stormwater management programs, *id.* at § 122.34(b)(2); (3) detecting and eliminating illicit discharges to the MS4, *id.* at § 122.34(b)(3); (4) reducing pollution to the MS4 from construction activities disturbing one acre or more, *id.* at § 122.34(b)(4); (5) minimizing water quality impacts from development and redevelopment

[17] The Phase II Rule also allows a small MS4 to be regulated under an NPDES permit covering a nearby large or medium-sized MS4, with provisions adapted to address the small MS4. 40 C.F.R. § 122.33(b)(3).

activities that disturb one acre or more, *id.* at § 122.34(b)(5); and (6) preventing or reducing pollutant runoff from municipal activities, *id.* at § 122.34(b)(6).[18]

The Municipal Petitioners contend that the measures regulating illicit discharges, small construction sites, and development activities unconstitutionally compel small

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[18] The Municipal Petitioners argue that the Minimum Measures exceed EPA's statutory authority under § 402(p) of the Clean Water Act. We disagree. The list of elements for a regulatory program that appears in § 402(p)(6) is nonexclusive, and EPA's adoption of the Minimum Measures represents a permissible interpretation of its authority under § 402(p)(6). *See Chevron,* 467 U.S. at 843-44.

The Municipal Petitioners argue that EPA is not entitled to *Chevron* deference, and that the Minimum Measures must be rejected absent a clear statement of congressional intent that EPA enact the Minimum Measures. The Municipal Petitioners argue that this clear statement requirement arises because there are "significant constitutional questions" about the permissibility of the Minimum Measures under the Tenth Amendment, and because the Minimum Measures alter "the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs,* 531 U.S. 159, 173 (2001).

As we explain, because the Phase II Rule includes at least one alternative to the Minimum Measures, *i.e.*, the option of seeking a permit under 40 C.F.R. § 122.26(d), the Minimum Measures do not present significant Tenth Amendment problems demanding a clear statement of congressional intent. Nor does the Phase II Rule alter the federal-state balance. To the contrary, the option of seeking a permit under 40 C.F.R. § 122.26(d) maintains precisely the same federal-state balance as existed prior to the Phase II Rule. *See, e.g., Natural Res. Def. Council v. EPA,* 966 F.2d 1292 (9th Cir. 1992) (reviewing Phase I Rule); *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1379 (D.C. Cir. 1977) (denying EPA authority to exempt MS4s from regulation under the Clean Water Act). Furthermore, even if a clear statement of congressional intent were necessary, § 402(p) of the Clean Water Act is replete with clear statements that Congress intended EPA to require MS4s either to obtain NPDES permits or to stop discharging stormwater.

MS4 operators to regulate third parties, *i.e.*, upstream dischargers. The Illicit Discharge Detection and Elimination measure requires that a permit seeker prohibit non-stormwater discharges to the MS4 and implement appropriate enforcement procedures. 40 C.F.R. § 122.34(b)(3)(ii)(B).[19] The Construction Site Stormwater Runoff Control measure requires a permit seeker to implement and enforce a program to reduce stormwater pollutants from small construction sites. *Id.* at §§ 122.34(b)(4)(i)-(ii).[20] It mandates erosion and sedimentation controls, site plan reviews that take account of water quality impacts, site inspections, and the consideration of public comment, and requires that construction site operators implement

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[19] This subsection provides that permit seekers must, "[t]o the extent allowable under State, Tribal, or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into your storm sewer systems and implement appropriate enforcement procedures and actions . . . ." 40 C.F.R. § 122.34(b)(3)(ii)(B).

[20] This subsection provides that permit seekers "must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre . . . . [The] program must include the development and implementation of, at a minimum: (A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law; (B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices; (C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality; (D) Procedures for site plan review which incorporate consideration of potential water quality impacts; (E) Procedures for receipt and consideration of information submitted by the public, and (F) Procedures for site inspection and enforcement control measures." 40 C.F.R. §§ 122.34(b)(4)(i)-(ii).

erosion, sedimentation, and waste management best management practices. *Id.* The Post-Construction/New Development measure requires permit seekers to address post-construction runoff from new development and redevelopment projects disturbing one acre or more. *Id.* at § 122.34(b)(5)(ii)(B).[21]

Noting that most MS4s are operated by municipal governments, and that "[t]he drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised," *New Orleans Gaslight Co. v. Drainage Comm'n,* 197 U.S. 453, 460 (1905), the Municipal Petitioners argue that requiring operators of small MS4s to implement "through ordinance or other regulatory mechanism" the regulations required by the Minimum Measures contravenes the Tenth Amendment. *See, e.g., New York v. United States,* 505 U.S. 144, 188 (1992).

EPA counters that the Phase II Rule does not violate the Tenth Amendment because operators of small MS4s may opt to avoid the Minimum Measures by seeking a permit under the Alternative Permit option, 40 C.F.R. § 122.33(b)(2)(ii).[22]

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[21] This subsection provides that permit seekers must "[u]se an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects [disturbing one acre or more] to the extent allowable under State, Tribal or local law." 40 C.F.R. §§ 122.34(b)(5)(ii)(B).

[22] EPA and NRDC also argue that the Minimum Measures are facially constitutional, and that the Phase II Rule presents no Tenth Amendment difficulties because operators of small MS4s may avoid stormwater regulation entirely by electing not to discharge stormwater

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Under the Tenth Amendment, "the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States,* 521 U.S. 898, 925 (1997); *see also New York,* 505 U.S. at 188. Similarly, the federal government may not force the States to regulate third parties in furtherance of a federal program. *See Reno v. Condon,* 528 U.S. 141, 151 (2000) (upholding a federal statutory scheme because it "does not require the States in their sovereign capacity to regulate their own citizens"). These protections extend to municipalities. *See, e.g., Printz* 931 n.15.

However, while the federal government may not *compel* them to do so, it may *encourage* States and municipalities to implement federal regulatory programs. *See New York,* 505 U.S. at 166-68. For example, the federal government may make certain federal funds available only to those States or municipalities that enact a given regulatory regime. *See, e.g., South Dakota v. Dole,* 483 U.S. 203, 205-08 (1987) (upholding federal statute conditioning state receipt of federal highway funds on state adoption of minimum drinking age of twenty-one). The crucial proscribed element is coercion; the residents of the State or municipality must retain "the ultimate decision" as to whether or not the State or municipality will comply with the federal regulatory program. *New York,* 505 U.S. at 168. However, as long as "the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is

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into federal waters in the first place. In light of our holding with regard to the Alternative Permit option, we do not consider these arguments.

insufficient to establish a Tenth Amendment violation." *City of Abilene v. EPA,* 325 F.3d 657, 662 (5th Cir. 2003).

With the Phase II Rule, EPA gave the operators of small MS4s a choice: either implement the regulatory program spelled out by the Minimum Measures described at 40 C.F.R. § 122.34(b), or pursue the Alternative Permit option and seek a permit under the Phase I Rule as described at 40 C.F.R. § 122.26(d). Thus, unless § 122.26(d) itself offends the Constitution's guarantees of federalism, the Phase II Rule does not violate the Tenth Amendment.

Pursuing a permit under the Alternative Permit option does require permit seekers, in their application for a permit to discharge, to propose management programs that address substantive concerns similar to those addressed by the Minimum Measures. *See* 40 C.F.R. § 122.26(d). However, § 122.26(d) lists the requirements for an *application* for a permit to discharge, not the requirements of the permit itself. Therefore, nothing in § 122.26(d) requires the operator of an MS4 to implement a federal regulatory program in order to receive a permit to discharge, because nothing in § 122.26(d) specifies the contents of the permit that will result from the application process.

City of Abilene, 325 F.3d 657, provides a helpful illustration. The cities of Abilene and Irving, Texas, have populations between 100,000 and 250,000, and so were required to apply for permits under the Phase I Rule, 40 C.F.R. § 122.26(d). *City of Abilene,* 325 F.3d at 659-60. Under § 122.26(d) the cities were required to submit proposed stormwater management programs. *Id.* at 660. They negotiated the terms of those programs with EPA, and EPA eventually presented the cities with proposed

management permits that contained conditions requiring the implementation of stormwater regulatory programs, and potentially requiring the regulation of third parties. *Id.* But, as the Fifth Circuit noted, this did not mean that the cities had no choice but to implement a federal regulatory program. Instead:

> The Cities filed comments objecting to those conditions, and negotiations continued until the EPA offered the Cities the option of pursuing numeric end-of-pipe permits, which would have required the Cities to satisfy specific effluent limitations rather than implement management programs. The Cities declined this offer, electing to continue negotiations on the management permits.

Id. The Fifth Circuit rejected the cities' contention that the resulting permits violated the Tenth Amendment by requiring the cities to regulate third parties according to federal standards. *Id.* at 661-63. Because the cities chose to pursue the management permits despite the fact that EPA provided them with an option for obtaining permits that would not have involved implementing a management program or regulating third parties, no unconstitutional coercion occurred. *Id.* at 663. The ultimate decision to implement the federal program remained with the cities.

Any operator of a small MS4 that wishes to avoid the Minimum Measures may seek a permit under § 122.26(d), and, as *City of Abilene* demonstrates, nothing in § 122.26(d) will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties, because § 122.26(d) specifies application requirements, not permit requirements. Therefore, by presenting the option of seeking a permit under § 122.26(d), the

Phase II Rule avoids any unconstitutional coercion. The Municipal Petitioners' claim that the Phase II Rule violates the Tenth Amendment therefore fails.

3. The First Amendment and the Minimum Measures

The Municipal Petitioners contend that the Public Education and Illicit Discharge Minimum Measures compel municipalities to deliver EPA's political message in violation of the First Amendment. The Phase II Rule's "Public Education and Outreach" Minimum Measure directs regulated small MS4s to "distribute educational materials to the community . . . about the impacts of stormwater discharges on water bodies and the steps the public can take to reduce pollutants in stormwater runoff." 40 C.F.R. § 122.34(b)(1)(i). The "Illicit Discharge Detection and Elimination" measure requires regulated small MS4s to "[i]nform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste." 40 C.F.R. § 122.34(b)(3)(ii)(D).

The Municipal Petitioners argue that the First Amendment prohibits EPA from compelling small MS4s to communicate messages that they might not otherwise wish to deliver. They further contend that EPA's interpretation of § 402(p) as authorizing these Measures does not warrant *Chevron* deference because it raises serious constitutional issues, but that even if deference were given, the resulting rule is unconstitutional because neither Congress nor EPA may dictate the speech of MS4s. They contend that municipalities are protected by the First Amendment, *Pacific Gas & Elec. v. Public Utilities Comm'n,* 475 U.S. 1, 8 (1986) ("Corporations and other

associations, like individuals, contribute to the [discourse] that the First Amendment seeks to foster . . . ."), which applies as much to compelled statements of "fact" as to those of "opinion." *Riley v. Nat'l Fed. of the Blind,* 487 U.S. 781, 797-98 (1988).

We conclude that the purpose of the challenged provisions is legitimate and consistent with the regulatory goals of the overall scheme of the Clean Water Act, *cf. Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457, 476 (1997), and does not offend the First Amendment.[23] The State may not constitutionally require an individual to disseminate an ideological message, *Wooley v. Maynard,* 430 U.S. 705, 713 (1976), but requiring a provider of storm sewers that discharge into national waters to educate the public about the impacts of stormwater discharge on water bodies and to inform affected parties, including the public, about the hazards of improper waste disposal falls short of compelling such speech.[24] These broad requirements do not

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[23] We decline to address two further arguments raised by EPA: first, that municipalities do not receive full First Amendment protections, under *Muir v. Alabama Educational Television Commission,* 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (*en banc*) ("Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression . . . ."), and *Aldrich v. Knab,* 858 F. Supp. 1480, 1491 (W.D. Wash. 1994) (holding that "unlike private broadcasters, the state itself does not enjoy First Amendment rights"), and second, that even if the First Amendment were fully applicable, the Phase II regulations would satisfy them because MS4s may avoid the compulsion to speak by seeking a permit under the Alternative option, 40 C.F.R. § 122.26(d)(2)(iv), rather than under the Minimum Measures.

[24] As a subsidiary matter, we note that it also falls short of compelling the MS4 to "regulate" third parties in contravention of the Tenth Amendment. Dispensing information to facilitate public awareness about

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dictate a specific message. They require appropriate educational and public information activities that need not include any specific speech at all. A regulation is facially unconstitutional only when every possible reading compels it, *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1476 (9th Cir. 1994),[25] but this is clearly not the case here.

As in *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio,* 471 U.S. 626 (1985), where the Supreme Court upheld certain disclosure requirements in attorney advertising, "[t]he interests at stake in this case are not of the same order as those discussed in *Wooley* [invalidating a law requiring that drivers display the motto "Live Free or Die" on New Hampshire license plates] . . . and *Barnette* [forbidding the requirement that public school students salute the flag because the State may not impose on the individual "a ceremony so touching matters of opinion and political attitude"]." *Id.* at 651. EPA has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943).

Informing the public about safe toxin disposal is non-ideological; it involves no "compelled recitation of a message" and no "affirmation of belief." *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 88 (1980) (upholding state law

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safe disposal of toxic materials constitutes "encouragement," not regulation.

[25] "When the constitutional validity of a statute or regulation is called into question, it is a cardinal rule that courts must first determine whether a construction is possible by which the constitutional problem may be avoided." *Meinhold,* 34 F.3d at 1476.

protecting petitioning in malls and noting that "*Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief"). It does not prohibit the MS4 from stating its own views about the proper means of managing toxic materials, or even about the Phase II Rule itself. Nor is the MS4 prevented from identifying its dissemination of public information as required by federal law, or from making available federally produced informational materials on the subject and identifying them as such.

Even if such a loosely defined public information requirement could be read as compelling speech, the regulation resembles another regulation that the Supreme Court has held permissible. In *Glickman,* 521 U.S. 457, the Court upheld a generic advertising assessment promulgated by the Department of Agriculture on behalf of California tree fruit growers because the order was consistent with an overall regulatory program that did not abridge protected speech:

> Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program.

Id. at 469-70 (footnotes omitted). Here, as in *Glickman,* the Phase II regulations impose no restraint on the freedom of any MS4 to communicate any message to any audience. They do not compel any specific speech, nor do they compel endorsement of political or ideological views. And since all permittees are engaged in the handling of stormwater runoff that must be conveyed in reasonably unpolluted form to national waters, it is similarly fair to presume that they will agree with the central message of a public safety alert encouraging proper disposal of toxic materials.[26] The Phase II regulation departs only from the second element in the *Glickman* analysis, because the public information requirement may compel a regulated party to engage in some speech at some time; but unlike the offensive messages in *Maynard* and *Barnette* (and even the inoffensive advertising messages at issue in *Glickman*) that speech is not specified by the regulation.[27]

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[26] In its most recent treatment of compelled speech, the Supreme Court held that a generic advertising campaign violated free speech where the message was specific and antagonistic to the preferred advertising message of the plaintiff, and the regulation compelling participation was not part of a broader regulatory apparatus already constraining the plaintiff's autonomy in the relevant arena. *United States Dep't. of Agriculture v. United Foods,* 533 U.S. 405, 410-17 (2001). The court distinguished this advertising program from the one in *Glickman* on the latter point: "[t]he program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting market autonomy." *Id.* at 411. Although the Phase II Rule is not an advertising or marketing regulation, it constitutes a "comprehensive program" restricting the autonomy of MS4s in the relevant arena of controlling toxic discharges to storm sewers that drain to U.S. waters.

[27] In deciding the similar question of whether a regulation impermissibly compelled speech by requiring manufacturers of mercury-containing

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The public information requirement does not impermissibly compel speech, and nothing else in the Phase II Rule offends the First Amendment.[28] The Rule does not compel a recitation of a specific message, let alone an affirmation of belief. To the extent MS4s are regulated by the public information requirement, the regulation is consistent with the overall regulatory program of the Clean Water Act and the responsibilities of point source dischargers.

4. Notice and Comment on the Alternative Permit Option

The Municipal Petitioners contend that, in adopting the Alternative Permit option, EPA did not comply with

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products to inform consumers how to dispose safely of the toxic material, the Second Circuit held that "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001). What speech may follow from the Phase II directive will not be "commercial" in the same sense that manufacturer labeling is, but it will be similar in substance to *Sorrell* to the extent that it informs the public how to dispose safely of toxins. We think the policy considerations underlying the commercial speech treatment of labeling requirements, *see, e.g.*, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1333-39, apply similarly in the context of the market-participant municipal storm sewer provider.

[28] The Alternative option contains a public education requirement that is similar but even less specific, and therefore even less burdensome, than the requirements in the Minimum Measures. *See* § 122.26(d)(2)(iv)(B)(6) (requiring permit seekers to propose programs to counter illicit discharges, including a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials").

the minimum notice and comment procedures required in informal rulemaking by the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. The APA requires an agency to publish notice of a proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* at 553(b)(3).

We have held that a "final regulation that varies from the proposal, even substantially, will be valid as long as it is 'in character with the original proposal and a logical outgrowth of the notice and comments.'" *Hodge v. Dawson,* 107 F.3d 705, 712 (9th Cir. 1997). In determining whether notice was adequate, we consider whether the complaining party should have anticipated that a particular requirement might be imposed. The test is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Am. Water Works Ass'n v. EPA,* 40 F.3d 1266, 1274 (D.C. Cir. 1994).

The Municipal Petitioners argue that the Alternative Permit option is not a logical outgrowth of EPA's proposed rule because, although numerous alternatives were discussed in the Preamble to the proposed rule, 63 Fed. Reg. at 1554-1557, the Alternative Permit option eventually adopted was not. EPA counters that the proposed rule included a supplementary alternative permitting system based on concepts similar to those in the Minimum Measures, including "simplified individual permit application

requirements."[29] EPA contends that the Alternative Permit option was a logical outgrowth of the comments it received on the proposal expressing concern that the Minimum Measures might violate the Tenth Amendment. 64 Fed. Reg. at 68,765.

The Alternative Permit option passes the *Hodge* test. The proposed rule suggested an individualized permitting option to be developed in response to comments during the notice and comment period. The Alternative option contains no elements that were not part of the original rule, even if they are configured differently in the final rule. Petitioners had, and took, their opportunity to object to the aspects of the Rule that they did not support in their comments on the Minimum Measures.

B. The General Permit Option and Notices of Intent

The Environmental Petitioners contend that the general permitting scheme of the Phase II Rule allows regulated small MS4s to design stormwater pollution control programs without adequate regulatory and public oversight, and that it contravenes the Clean Water Act because it does not require EPA to review the content of dischargers' notices of intent and does not contain express requirements for public participation in the NPDES permitting process.

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[29] Municipal Petitioners concede that "simplified individual permit application requirements" were discussed, but they contend that the permit requirements discussed are not sufficiently similar to those promulgated to establish a logical outgrowth.

In reviewing a federal administrative agency's interpretation of a statute it administers, we first determine whether Congress has expressed its intent unambiguously on the question before the court. *See Chevron,* 467 U.S. 837, 842-44 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). "If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1162, *amended by* 197 F.3d 1035 (9th Cir. 1999) (citations and internal quotations omitted).

We conclude that the Phase II General Permit option violates the Clean Water Act's requirement that permits for discharges "require controls to reduce the discharge of pollutants to the maximum extent practicable," 33 U.S.C. § 1342(p)(3)(B)(iii). We also conclude that the Phase II General Permit option violates the Clean Water Act because it does not contain express requirements for public participation in the NPDES permitting process. We remand these aspects of the Phase II Rule.[30]

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[30] EPA argues that the Environmental Petitioner's challenge is not ripe for review because "the question of whether some general permit somewhere might fail to assure that pollutants are reduced to the maximum extent practicable is not ripe for review." But we are not addressing the merits of any specific permit. Rather, the question before us "is purely one of statutory interpretation that would not benefit from further factual development of the issues presented." *Whitman v. American Trucking,* 531 U.S. 457, 479 (2001). Specifically, we are addressing whether EPA, in promulgating the Phase II Rule,

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1. Phase II General Permits and Notices of Intent

Primary responsibility for enforcement of the requirements of the Clean Water Act is vested in the Administrator of the EPA. 33 U.S.C. § 1251(d); *see also* 33 U.S.C. § 1361(a) ("The Administrator [of EPA] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."). The Clean Water Act renders illegal any discharge of pollutants not specifically authorized by a permit. 33 U.S.C. § 1311(a) ("Except in compliance with this section and [other sections detailing permitting requirements] of this title, the discharge of any pollutant by any person shall be unlawful."). Under the Phase II Rule, dischargers may apply for an individualized permit with the relevant permitting authority, or may file a "Notice of Intent" ("NOI") to seek coverage under a "general permit." 40 C.F.R. § 122.33(b).

A general permit is a tool by which EPA regulates a large number of similar dischargers. Under the traditional general permitting model, each general permit identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers. Those dischargers may then acquire permission to discharge under the Clean Water Act by filing NOIs, which embody each discharger's agreement to abide by the terms of the general permit. Because the NOI

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has accomplished the substantive controls for municipal stormwater that Congress mandated in § 402(p) of the Clean Water Act. As we held in *Natural Resources Defense Council v. EPA*, 966 F.2d at 1296-97, 1308, this question is ripe for review.

represents no more than a formal acceptance of terms elaborated elsewhere, EPA's approach does not require that permitting authorities review an NOI before the party who submitted the NOI is allowed to discharge. General permitting has long been recognized as a lawful means of authorizing discharges. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977).

The Phase II general permitting scheme differs from the traditional general permitting model. The Clean Water Act requires EPA to ensure that operators of small MS4s "reduce the discharge of pollutants to the maximum extent practicable." 40 U.S.C. § 1342(p)(3)(B). To ensure that operators of small MS4s achieve this "maximum extent practicable" standard, the Phase II Rule requires that each NOI contain information on an individualized pollution control program that addresses each of the six general criteria specified in the Minimum Measures; thus, according to the Phase II Rule, submitting an NOI and implementing the Minimum Measures it contains "constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.'" 40 C.F.R. § 122.34(a).

Because a Phase II NOI establishes what the discharger will do to reduce discharges to the "maximum extent practicable," the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime. The text of the Rule itself acknowledges that a Phase II NOI is a permit application that is, at least in some regards, functionally equivalent to a detailed application for an individualized permit. *See, e.g.,* 40 C.F.R. § 122.34(d)(1) ("In your permit application (either a notice of intent for coverage under a general permit or an individual permit application), you must identify and submit to your NPDES

permitting authority the following information . . . ."). For this reason, EPA rejected the possibility of providing a "form NOI" to Phase II permittees, explaining that "[w]hat will be required on an MS4's NOI . . . is more extensive than what is usually required on an NOI, so a 'form' NOI for MS4s may be impractical." 64 Fed. Reg. at 68,764.

2. Failure to Regulate

The Environmental Petitioners argue that, by allowing NPDES authorities to grant dischargers permits based on unreviewed NOIs, the Rule creates an impermissible self-regulatory system.[31] Petitioners contend the Rule impermissibly fails to require that the permitting authority review an NOI to assure compliance with Clean Water Act standards, including the standard that municipal stormwater pollution be reduced to "the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). *See* 40 C.F.R. § 123.35 (setting out requirements for permitting authorities, but not requiring review of NOI); 64 Fed. Reg. at 68,764 ("EPA disagrees that formal approval or disapproval by the permitting authority is needed").

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[31] Petitioners suggest that EPA should be held to the standard it espoused to procure judicial approval for the Phase I program. In 1991, responding to NRDC's assertion that the Phase I Rule failed to set "hard criteria" for review of MS4 stormwater programs, EPA responded that "inadequate proposals will result in the denial of permit applications." Respondent's Brief at 67, *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (Nos. 91-70200, 91-70176, & 90-70671). Petitioners contend that this court relied on that representation in ruling for EPA on that issue. *Natural Res. Def. Council v. EPA*, 966 F.2d at 1308 n.17 ("Individual NPDES permit writers . . . will decide whether application proposals are adequate . . . .").

EPA maintains that the Phase II permit system is fully consistent with the authorizing statute. It contends that § 402(p)(6) granted EPA flexibility in designing the Phase II "comprehensive program," and notes that while the statute does not require general permits, neither does it preclude them. EPA contends that Congress delegated the task of designing the program to EPA, and that EPA reasonably adopted a "flexible version" of the NPDES permit program to suit the unique needs of the Phase II program. It disputes that the general permit program creates "paper tigers," especially since EPA, States, and citizens may initiate enforcement actions. Finally, EPA argues that the Rule does not create a self-regulatory program, but that even if it did, nothing in § 402(p)(6) precludes such a program.

Reviewing the Phase II Rule under the first step of *Chevron,* we note that the plain language of § 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), expresses unambiguously Congress's intent that EPA issue no permits to discharge from municipal storm sewers unless those permits "require controls to reduce the discharge of pollutants to the maximum extent practicable."

Phase II general permits will likely impose requirements that ensure that operators of small MS4s comply with many of the standards of the Clean Water Act. Thus, general permits issued under Phase II will ordinarily contain numerous substantive requirements, just as did the permits issued under Phase I. *See* 40 C.F.R. §§ 123.35 & 123.35(a) ("§ 123.35 As the NPDES Permitting Authority for regulated small MS4s, what is my role? (a) You must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124 and 125 of this

chapter."); *see also* 40 C.F.R. § 122.28 (outlining requirements for NPDES authorities issuing general permits). And every operator of a small MS4 who files an NOI under Phase II "must comply with other applicable NPDES permit requirements, standards, and conditions established in the ... general permit." *See* 40 C.F.R. §§ 122.34 & 122.34(f).

However, while each Phase II general permit will likely ensure that operators of small MS4s comply with certain standards of the Clean Water Act, they will not "require controls to reduce the discharge of pollutants to the maximum extent practicable." According to the Phase II Rule, the operator of a small MS4 has complied with the requirement of reducing discharges to the "maximum extent practicable" when it implements its stormwater management program, *i.e.*, when it implements its Minimum Measures. 40 C.F.R. § 122.34(a); *see also* 64 Fed. Reg. at 68753 (stating EPA's anticipation that limitations more stringent that the minimum control measures "will be unnecessary"). Nothing in the Phase II regulations requires that NPDES permitting authorities review these Minimum Measures to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable.[32]

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[32] That the Rule allows a permitting authority to review an NOI is not enough; every permit must comply with the standards articulated by the Clean Water Act, and unless every NOI issued under a general permit is reviewed, there is no way to ensure that such compliance has been achieved.

The regulations do require NPDES permitting authorities to provide operators of small MS4s with "menus" of management practices to assist in implementing their Minimum Measures, *see* 40 C.F.R. § 123.35(g), but again, nothing requires that the combination of items

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See 40 C.F.R. § 123.35 ("As the NPDES Permitting Authority for regulated small MS4s, what is my role?"). Therefore, under the Phase II Rule, nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.

In fact, under the Phase II Rule, in order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction. No one will review that operator's decision to make sure that it was reasonable, or even good faith.[33] Therefore, as the Phase II Rule stands, EPA would allow permits to issue that would do less than *require* controls to reduce the discharge of pollutants to the maximum extent practicable.[34] *See* 64 Fed. Reg. at 68753 (explaining that

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that the operator of a small MS4 selects from this "menu" will have the combined effect of reducing discharges to the maximum extent practicable.

Nor is the availability of citizen enforcement actions a substitute for EPA's enforcement responsibility, especially because, as discussed below, the Rule does not require that NOIs be publicly available. Absent review on the front end of permitting, the general permitting regulatory program loses meaning even as a procedural exercise.

[33] EPA identifies no other general permitting program that leaves the choice of substantive pollution control requirements to the regulated entity, and we are not persuaded by the analogy it urges to the traditional model of general permitting (where NOIs routinely are not reviewed), because, as we have noted, the Phase II general permit model is substantially dissimilar.

[34] In its petition for rehearing, EPA argues for the first time that because the regulations require NPDES Permitting Authorities to include in general permits "any additional measures necessary" to ensure that the maximum extent practicable standard is met, 40 C.F.R.

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the minimum control measures will protect water quality if they are "properly implemented"). We therefore must reject this aspect of the Phase II Rule as contrary to the clear intent of Congress. *Cf. Natural Res. Def. Council,* 966 F.2d at 1305 (rejecting as arbitrary and capricious a permitting system that allowed regulated industrial stormwater dischargers to "self-report" whether they needed permit coverage).

Involving regulated parties in the development of individualized stormwater pollution control programs is a laudable step consistent with the directive to consult with state and local authorities in the development of the § 402(p)(6) comprehensive program. But EPA is still required to ensure that the individual programs adopted are consistent with the law. Our holding should not prevent the Phase II general permitting program from proceeding mostly as planned. Our holding does not preclude regulated parties from designing aspects of their own stormwater management programs, as contemplated under the Phase II Rule. However, stormwater management programs that are

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§§ 123.35(h)(1), 123.35(f) (incorporating by reference the "maximum extent practicable" requirement of 40 C.F.R. §§ 122.34(a)), 122.34(f) (requiring small MS4s to comply with additional measures), the Phase II Rule ensures that discharges will be reduced to the maximum extent practicable.

The trouble with EPA's reasoning is that the Phase II Rule defines the "maximum extent practicable" standard in such a way that no "additional measures" will ever be necessary under § 123.35(h)(1). While a Permitting Authority may impose additional measures, nothing compels it to do so because, merely by implementing the best management practices that the operator of a small MS4 has chosen for itself, that small MS4 will already have met the "maximum extent practicable" standard. *See* 40 C.F.R. § 122.34(a).

designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable. We therefore remand this aspect of the Rule.

3. Public Participation

The Environmental Petitioners contend that the Phase II Rule fails to provide for public participation as required by the Clean Water Act, because the public receives neither notice nor opportunity for hearing regarding an NOI. The EPA replies on the one hand by arguing that NOIs are not "permits" and therefore are not subject to the public availability and public hearing requirements of the Clean Water Act, and on the other hand by arguing that the combination of the public involvement minimum measure, 40 C.F.R. § 122.34(b)(2), the Federal Freedom of Information Act, 5 U.S.C. § 552, and state freedom of information acts would fulfill any such requirements if NOIs were permits.

Reviewing the Phase II Rule under *Chevron* step one, we conclude that clear Congressional intent requires that NOIs be subject to the Clean Water Act's public availability and public hearings requirements. The Clean Water Act requires that "[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public," 33 U.S.C. § 1342(j), and that the public shall have an opportunity for a hearing before an permit application is approved, 33 U.S.C. § 1342(a)(1). Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's

approach and philosophy. *See* 33 U.S.C. § 1251(e); *see also Costle v. Pacific Legal Found.*, 445 U.S. 198, 216 (1980) (noting the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). EPA has acknowledged that technical issues relating to the issuance of NPDES permits should be decided in "the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit." 44 Fed. Reg. 32,854, 32,885 (June 7, 1979).

As we noted above, under the Phase II Rule it is the NOIs, and not the general permits, that contain the substantive information about how the operator of a small MS4 will reduce discharges to the maximum extent practicable. Under the Phase II Rule, NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements. Thus, if the Phase II Rule does not make NOIs "available to the public," and does not provide for public hearings on NOIs, the Phase II Rule violates the clear intent of Congress. EPA's first argument – that NOIs are not subject to the public availability and public hearings requirements of the Clean Water Act – therefore fails.

We therefore reject the Phase II Rule as contrary to the clear intent of Congress insofar as it does not provide for public hearings on NOIs as required by 33 U.S.C. § 1342(a)(1). However, Congress has not directly addressed the question of what would constitute an NOI being "available to the public" as required by 33 U.S.C. § 1342(j). Under *Chevron* step two, we must defer to EPA's interpretation of "available to the public" unless it is arbitrary, capricious, or manifestly contrary to the statute.

EPA argues that the NOIs are "available to the public" as a result of the combined effects of the public participation minimum measures, and of federal and state freedom of information acts. This argument is unconvincing. First, the public participation Minimum Measure only requires dischargers to design a program minimally consistent with State, Tribal, and local requirements. 40 C.F.R. § 122.34(b)(2). Second, the federal Freedom of Information Act only applies to documents that are actually in EPA's possession, not to documents that are in the possession of state or tribal NPDES authorities, *see* 40 C.F.R. § 2 (providing EPA's policy for releasing documents under the federal Freedom of Information Act), and nothing in the Phase II Rule provides that EPA obtain possession of every NOI that is submitted to a NPDES permitting authority. *See* 40 C.F.R. § 123.41(a) (making information provided to state NPDES authorities available to EPA only *upon request*). Thus, under the Phase II Rule, NOIs will only "be available to the public" subject to the vagaries of state and local freedom of information acts. We conclude that EPA's interpretation of 33 U.S.C. § 1342(j), as embodied in the provisions of the Phase II Rule providing for the public availability of NOIs, is manifestly contrary to the Clean Water Act, which contemplates greater scope, greater certainty, and greater uniformity of public availability than the Phase II Rule provides. We therefore reject this aspect of the Phase II Rule.[35]

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[35] EPA argues for the first time in its petition for rehearing that NOIs will be publicly available under 40 C.F.R. § 122.34(g)(2). Addressing operators of regulated small MS4s, this section provides: "You must make your records, including a description of your storm water management program, available to the public at reasonable times

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In sum, we conclude that EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and EPA's failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore vacate those portions of the Phase II Rule that address these procedural issues relating to the issuance of NOIs under the Small MS4 General Permit option, and remand so that EPA may take appropriate action to comply with the Clean Water Act.

C. Failure to Designate

We reject the Environmental Petitioners' contention that EPA's failure to designate for Phase II regulation serious sources of stormwater pollution, including certain industrial ("Group A") sources and forest roads, was arbitrary and capricious. *See Marsh v. Oregon Natural Res. Council,* 490 U.S. 360 (1989).[36]

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during regular business hours." While this section does seem to provide for the public availability of a small MS4's records, we are troubled that nothing in EPA's initial briefs indicated that EPA considered NOIs to be subject to this section. We normally defer to an agency's interpretations of its own regulations, but we may decline to defer to the *post hoc* rationalizations of appellate counsel. *See, e.g., Martin v. Occupational Safety and Health Review Commission,* 499 U.S. 144, 150, 156 (1991). If EPA intends this section to provide for the public availability of NOIs – for example because it intends NOIs to be among the records subject to this section – it may clarify on remand.

[36] Agency determinations based on the record are reviewed under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). The standard is narrow and the reviewing court may not substitute its judgment for that of the agency. *Marsh,* 490 U.S. at 378. However, the agency must articulate a rational connection between the facts found

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1. "Group A" Facilities

In addition to the small MS4s and construction sites ultimately designated for regulation under the Phase II Rule, EPA evaluated a variety of other point-source discharge categories for potential Phase II regulation. One group of dischargers (referred to as the "Group A" facilities) included sources that "are very similar, or identical" to regulated stormwater discharges associated with industrial activity that were not designated for Phase I regulation for administrative reasons unrelated to their environmental impacts.[37] 64 Fed. Reg. at 68,779. EPA estimates that Group A includes approximately 100,000 facilities, including auxiliary facilities and secondary activities ("*e.g.*, maintenance of construction equipment

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and the conclusions made. *Washington v. Daley,* 173 F.3d 1158, 1169 (9th Cir. 1999). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh,* 490 U.S. at 378. The court may reverse under the "arbitrary and capricious" standard only if the agency:

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

[37] EPA explains that the Group A facilities were not regulated with the other Phase I sources because EPA used Standard Industrial Classification Index (SIC) codes in defining the universe of regulated industrial activities: "By relying on SIC codes, a classification system created to identify industries rather than environmental impacts from these industries [sic] discharges, some types of storm water discharges that might otherwise be considered 'industrial' were not included in the existing NPDES storm water program." 64 Fed. Reg. at 68,779.

and vehicles, local trucking for an unregulated facility such as a grocery store," *id.*) and facilities intentionally omitted from Phase I designation ("*e.g.,* publicly owned treatment works with a design flow of less than 1 million gallons per day, landfills that have not received industrial waste," *id.*).

The Environmental Petitioners contend that EPA should have designated the Group A facilities for categorical Phase II regulation after finding (1) that stormwater discharges from these facilities are the same as those from the industrial sources regulated under Phase I, and (2) that such discharges may cause "adverse water quality impacts." *Id.* Petitioners argue that these findings, and EPA's failure to provide individualized analysis regarding whether any specific source category within Group A requires regulation, render EPA's decision not to regulate any of these sources under the Rule arbitrary and capricious. They maintain that EPA's "line-drawing," which regulates some pollution sources but leaves nearly identical sources unregulated without any persuasive rationale, is necessarily arbitrary and capricious. *See Natural Res. Def. Council,* 966 F.2d at 1306 (EPA's decision not to regulate construction sites smaller than five acres was arbitrary when EPA provided no data to justify the five-acre threshold and admitted that unregulated sites could have significant water quality impacts).

Petitioners argue that § 402(p)(6) at least required EPA to make findings with respect to individual Group A categories, and that data collected from Phase I permit applications could be used to evaluate the pollutant potential of the identical Group A sources. They contend that these findings should have sufficed as a basis for designating at least some Group A sources, and that EPA's conclusion that it lacked adequate nationwide data upon

which to designate any of these sources is not supported by the record evidence. Comparing EPA's identification of the serious polluting potential of some of these sources with its statutory mandate under § 402(p)(6) "to protect water quality," they argue that EPA fails even the forgiving standard of arbitrary and capricious review in that it has "offered an explanation for its decision that runs counter to the evidence before [it]" and "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

EPA maintains that it considered Group A facilities' similarity to already regulated sources as only one of several criteria that it used in designating sources for regulation under Phase II, 64 Fed. Reg. at 68,780, and that sources that appear "similarly situated" under one criterion are not necessarily similarly situated under all. EPA asserts that nothing in § 402(p)(6) implied a responsibility to make individualized findings regarding each Group A subcategory, and it maintains that it simply lacked sufficient data to support nationwide designation of the Group A facilities. EPA notes that, after failing to receive requested comment providing such data, it proposed instead "to protect water quality" by allowing regional regulation of problem Group A facilities under the residual designation authority. EPA contends that agencies must be afforded deference in determining the data necessary to support regulatory decisionmaking and that it reasonably determined the quantum of data it would need to support the designation of additional sources on a nationwide basis. *See Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999).

We conclude that sufficient evidence supports EPA's decision not to designate Group A sources on a nationwide

basis, and instead to establish local and regional designation authority to account for these sources and protect water quality. Although we are troubled by the purely administrative basis for the distinction between facilities regulated under the Phase I Rule and the Group A facilities that remain unregulated under Phase II,[38] EPA's choice of the Phase I standard for designation is not the issue before us. Before us is whether EPA acted arbitrarily in declining to designate the Group A sources on a nationwide basis under the Phase II Rule, and we cannot say that it did.

EPA has articulated a rational connection between record facts indicating insufficient data to categorically regulate Group A facilities and its corresponding conclusion not to do so, and we defer to that decision. *See Washington v. Daley,* 173 F.3d 1158, 1169 (9th Cir. 1999). In the text of the Rule, EPA explains that the process behind its decision not to nationally designate Group A sources for Phase II regulation focused not only on the likelihood of contamination from a source category, but also on the sufficiency of national data about each category and whether pollution concerns were adequately addressed by existing environmental regulations.[39] We cannot say that

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[38] As discussed in footnote 37, Group A facilities were not regulated with other Phase I industrial sources based on a government coding system used to distinguish different types of industry (without reference to their similar environmental impacts). *See* 64 Fed. Reg. at 68,779.

[39] "In identifying potential categories of sources for designation in today's notice, EPA considered designation of discharges from Group A and Group B facilities. EPA applied three criteria to each potential category in both groups to determine the need for designation: (1) The likelihood for exposure of pollutant sources included in that category, (2) whether such sources were adequately addressed by other environmental programs, and (3) whether sufficient data were available at this

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EPA relied on factors Congress had not intended it to consider, that it failed to consider an important aspect of the problem, or that its rationale is implausible. *See Motor Vehicle Mfrs.,* 463 U.S. at 43. Nor did EPA's decision run counter to the evidence before it. *Id.* The Environmental Petitioners allege that its decision not to regulate Group A facilities runs counter to evidence that similar sources are highly polluting, but as EPA considered evidence beyond those similarities that persuaded it not to regulate, we cannot say that EPA's decision is unsupported by the record. Nothing in § 402(p)(6) unambiguously requires EPA to evaluate the Group A source categories individually, and we defer to EPA's interpretation of the statute it is charged with administering. *See Royal Foods Co. v. RJR Holdings,* 252 F.3d 1102, 1106 (9th Cir. 2001).

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time on which to make a determination of potential adverse water quality impacts for the category of sources. As discussed previously, EPA searched for applicable nationwide data on the water quality impacts of such categories of facilities . . . .

"EPA's application of the first criterion showed that a number of Group A and B sources have a high likelihood of exposure of pollutants . . . . Application of the second criterion showed that some categories were likely to be adequately addressed by other programs.

"After application of the third criterion, availability of nationwide data on the various storm water discharge categories, EPA concluded that available data would not support any such nationwide designations. While such data could exist on a regional or local basis, EPA believes that permitting authorities should have flexibility to regulate only those categories of sources contributing to localized water quality impairments . . . . If sufficient regional or nationwide data become available in the future, the permitting authority could at that time designate a category of sources or individual sources on a case-by-case basis." 64 Fed. Reg. at 68,780.

2. Forest Roads

The Environmental Petitioners also contend that EPA arbitrarily failed to regulate forest roads under the Rule despite clear evidence in the record documenting the need for stormwater pollution control of drainage from these roads. Petitioners again contend that this agency action is arbitrary, because EPA has offered an explanation for its decision that runs counter to the evidence before it.

Petitioners point to EPA's own conclusion that forest roads "are considered to be the major source of erosion from forested lands, contributing up to 90 percent of the total sediment production from forestry operations."[40] They note that both unimproved forest roads and construction sites create large expanses of non-vegetated soil subject to stormwater erosion, and argue that construction site data thus also support regulation of forest roads. Petitioners observe that EPA has cited no contrary evidence indicating that forest roads are not sources of stormwater pollutant discharges to U.S. waters, and they argue that Phase II regulation is necessary "to protect water quality," because proper planning and road design can minimize erosion and prevent stream sedimentation. Petitioners note that this court has previously held that, in the absence of such "supportable facts," EPA is not entitled to the usual assumption that it has "rationally exercised the duties delegated to it by Congress." *Natural Res. Def. Council,* 966 F.2d at 1305.

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[40] *Guidance Specifying Management Measures For Sources of Nonpoint Pollution in Coastal Waters,* EPA guidance paper 840-B-93-001c (Jan. 1993), *available at* http://www.epa.gov/owow/nps/mmgi/index.html (last visited Sept. 18, 2002) ("Coastal Waters").

EPA's response is that we have no jurisdiction to hear this challenge, chiefly because, it believes, the challenge is time-barred by Clean Water Act § 509(b)(1), 33 U.S.C. § 1369(b)(1) (providing that "application for review shall be made within 120 days from the date of [agency action]"). EPA promulgated silviculture regulations in 1976 that exclude from NPDES permit requirements certain silvicultural activities that EPA determined constitute non-point source activities, including "surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1).[41] EPA asserts that the exclusion applies to forest roads in general, not only to "construction" and "maintenance" - an assertion disputed by Petitioners – and that any challenge to the decision not to regulate forest roads should have been brought within 120 days of the promulgation of that rule. *See* 33 U.S.C. § 1369(b)(1).

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[41] The provision provides in full as follows:

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

40 C.F.R. § 122.27(b)(1).

EPA's argument might be more persuasive if Petitioners' contention could be understood essentially as a direct challenge to the 1976 silviculture regulations, but this is not the case. Even were we to assume that EPA exempted forest roads from NPDES permit requirements in 1976 under 40 C.F.R. § 122.27(b)(1), that would not resolve the question whether EPA should have addressed forest roads in its "comprehensive program . . . to protect water quality" under § 402(p)(6), because § 402(p)(6) was not enacted until 1987. Petitioners challenge EPA's decision not to regulate under the new portion of the statute, not the decision not to regulate under other provisions that were in effect earlier.

EPA argues in the alternative that Petitioners should have sought judicial review when EPA considered amending § 122.27(b)(1) – to delete the language that it asserts renders forest roads non-point sources – but then determined not to make the amendment. However, we are aware of no statute or legal doctrine providing that a party's failure to challenge an agency's decision *not* to amend its rules in one proceeding deprives the party of the right to challenge, in a contemporaneous proceeding, the promulgation of an entire new rule which could have, but did not, provide the full relief the party seeks. Assuming that EPA is correct that § 122.27(b)(1) defines forest roads as non-point sources, both the Phase II Rule proceedings and the proceedings in which the proposed amendment to § 122.27(b)(1) was considered and rejected were proper proceedings in which to raise the issue whether discharges from forest roads should be regulated. Petitioners chose to raise the issue in their comments to the proposed Phase II Rule, because they believed that Clean Water Act § 402(p)(6) mandates the regulation of forest roads. They

did not lose their right to challenge the final Phase II Rule's failure to regulate forest roads simply because they did not also raise a challenge to EPA's failure to adopt an amendment to § 122.27(b)(1) that the agency initially proposed. (We note, incidentally, that it appears that even a successful challenge to § 122.27(b)(1) would likely not have achieved the objective the Environmental Petitioners sought: it would only have allowed case-by-case coverage for forest roads, and not for overall coverage.)

Finally, EPA suggests that Petitioners' comments during the Phase II rulemaking process were too short to create jurisdiction in this court to hear this challenge. However, EPA exaggerates the slightness of those comments, which comprised two paragraphs, with footnotes, stating objections and providing support. We also agree with Petitioners that EPA was aware of the forest road sedimentation problem at the time of the rulemaking.[42] Indeed, EPA responded to the comments without disputing that the problem is serious. 3 EPA, *Response to Public Comments* 8 (Oct. 29, 1999). Rather, the agency relied on 40 C.F.R. § 122.27(b)(1), indicating that it was barred from acting under the Phase II Rule by § 122.27(b)(1).

EPA does not seriously address the merits of Petitioners' objections to the Rule in its brief to this court. Instead, EPA relies almost entirely on its assertion that we lack

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[42] Nonpoint Source Pollution: The Nation's Largest Water Quality Problem, EPA841-F-96-004A ("Pointer # 1") ("The latest *National Water Quality Inventory* indicates that agriculture is the leading contributor to water quality impairments, degrading 60 percent of the impaired river miles and half of the impaired lake acreage surveyed by states, territories, and tribes.").

jurisdiction to decide this question. It does, however, strongly imply that its failure to adopt its own proposed amendment in the proceeding pertaining to § 122.27(b)(1) relieves it of its obligation to consider including forest roads in the Phase II Rule proceedings. We reject any such contention. Petitioners' assertion that § 402(p)(6) requires that the Phase II Rule contain provisions regulating forest roads necessitates a response from EPA on the merits.

Having concluded that the objections of the Environmental Petitioners are not time-barred, and that we have jurisdiction to hear them, but that EPA failed to consider those objections on the merits, we remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.

D. AF&PA's Standing

The American Forestry & Paper Association (AF&PA), a national trade association representing the forest, pulp, paperboard, and wood products industry, is one of the two Industry Petitioners asserting the remaining claims.[43] Before considering these challenges, however, we consider whether AF&PA has standing to raise them.

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[43] The Municipal Petitioners join in asserting the "regulatory basis" claim at Part II(F)(1).

EPA argues that AF&PA lacks standing because it cannot show that it represents entities that suffer a cognizable injury under the Phase II Rule as promulgated. EPA argues that the interests of AF&PA entities might have supported standing had EPA decided to regulate forest roads as Phase II stormwater dischargers, but since EPA declined to do so, none of AF&PA's members are currently subject to the Rule. AF&PA contends that its members have a cognizable legal interest in the Rule because they risk becoming subject to regulation at any future time under the continuing designation authority.

We agree that AF&PA lacks standing. A claimant meeting Article III standing requirements must show that "(1) it has suffered an 'injury in fact' . . . ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC),* 528 U.S. 167, 180-81 (2000). Standing requires an injury that is "actual or imminent, not 'conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). AF&PA's interest in avoiding future regulation of forest roads is not actually or imminently threatened by any potential result in this case. No ripe claim about misuse of the residual authority to regulate forest road discharge, or any other kind of discharge, is before the court. Should members of AF&PA become subject to Phase II regulation through subsequent administrative action, it will have standing to challenge those actions at that time. In the meanwhile, we proceed to the merits of the remaining claims on behalf of AF&PA's co-petitioner, the National Association of Home Builders, which has established its standing to raise them.

E. Consultation with State and Local Officials

The Industry Petitioners contend that EPA failed to consult with the States on the Phase II Rule as required by § 402(p)(5), which instructs EPA to conduct studies "in consultation with the States," and § 402(p)(6), which instructs the Administrator to issue regulations based on these studies "in consultation with State and local officials." 33 U.S.C. §§ 1342(p)(5)-(6). We conclude that EPA satisfied its statutory duty of consultation. *See Marsh,* 490 U.S. at 378.

Petitioners concede several instances in which EPA circulated drafts of the Phase II Rule to state and local authorities, but argue that these consultations were meaningless because (1) the reports were circulated too far in advance of the actual rulemaking, (2) the rulemaking wrongfully proceeded based on other sources of input, (3) standard APA notice and comment procedures could not suffice because Congress must have intended something more when it added the consultation requirements to the language of § 402, and (4) consultation at the final stage of rulemaking was inadequate because comment was sought on the final report only after it had been submitted to Congress and the Phase II Rule had been promulgated. Petitioners provide examples of state feedback that allegedly went unheeded by EPA in its promulgation of the final Rule.

EPA maintains that it consulted extensively with States and localities in developing the Phase II Rule, discharging its obligations under §§ 402(p)(5) & (6). EPA contends that the comments Petitioners cite as unheeded by EPA demonstrate that EPA *did* consult with States

concerning the Rule, even if some States did not concur in EPA's ultimate conclusion, and that the final rule adopted a good measure of the flexibility sought by state representatives. EPA argues that Industry Petitioners cannot complain that consultation was inadequate simply because it did not result in the adoption of Petitioners' preferred views.

EPA also disputes Petitioners' allegation that while EPA did comply with the terms of the 1999 Appropriations Act (requiring EPA to defend the proposed Phase II Rule before Congress and then publish the final report for public comment), it demonstrated its failure to adequately consult by publishing the report for public comment *after* the Phase II Rule had been formally promulgated, rendering any subsequent public comment meaningless. EPA counters that these actions do not indicate that it failed to satisfy Congress's directive that it consult with state and local officials, because EPA had engaged in extensive consultation before Congress requested the Appropriations Act report, and Congress did not require further consultation when it conditioned promulgation of the Rule only on the submission of this final report. EPA claims that while Congress required it to publish the report after its submission, public comment on the report was not required before promulgation, and that the statutory deadline structure rendered any other interpretation impossible.

We conclude that the overall record indicates EPA met its statutory duty of consultation. A draft of the first report was circulated to States, EPA regional offices, the Association of State and Interstate Water Pollution Control Administrators ("ASIWPCA"), and other stakeholders in November, 1993, and was revised based on comments received. EPA established the Urban Wet Weather Flows

Federal Advisory Committee ("FACA Committee"), balancing membership between EPA's various outside stakeholder interests, including representatives from States, municipalities, Tribes, commercial and industrial sectors, agriculture, and environmental and public interest groups. 64 Fed. Reg. 68,724. The 32 members of the Phase II FACA Subcommittee, reflecting the same balance of interests, met fourteen times over three years and state and municipal representatives provided substantial input regarding the draft reports, the ultimate Phase II Rule, and the supporting data.[44] *Id.* EPA instituted the Phase II Subcommittee meetings in addition to the standard APA notice and comment procedures, which EPA also followed.

The fact that the Rule did not conform to Petitioners' hopes and expectations does not bear on whether EPA adequately consulted state and local officials. Although required to consult with States and localities, EPA was free to chart the substantive course it saw fit. EPA was not required to consult with States on the Appropriations Act report. Even if EPA should have sought further comment at that late stage, failure to do so does not outweigh the evidence demonstrating extensive consultation and cooperation with local authorities on development of the Rule.

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[44] NRDC argues that this claim is not only meritless for the reasons stated by EPA, but also frivolous, since industry petitioner National Association of Home Builders, as a member of the FACA Phase II Subcommittee, participated in and affirmed that such consultation took place.

F. Designation of Certain Small MS4s and Construction Sites

The Industry Petitioners contend that, in designating certain small MS4s and construction sites for regulation under the Phase II Rule, EPA failed to adhere to the statutorily required regulatory basis and misinterpreted record evidence. We disagree.

1. Regulatory Basis

The Industry Petitioners and the Municipal Petitioners contend that EPA violated the statutory command to base the Phase II regulations on § 402(p)(5) studies. We review EPA's interpretation of its statutory authority under the *Chevron* standard, 467 U.S. at 842-44, and affirm.

Petitioners argue that the studies mandated by § 402(p)(5) were intended to provide the sole substantive basis for the "comprehensive program" envisioned in § 402(p)(6), but that EPA also (and thus improperly) based its designation of small MS4s and construction sites on (1) public comment received in the aftermath of judicial invalidation of the scope of construction sites regulated by the Phase I Rule,[45] and (2) additional research discussed in the Preamble to the Phase II Rule.[46]

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[45] *See Natural Res. Def. Council,* 966 F.2d at 1306 (remanding EPA's decision to regulate only construction sites disturbing more than five acres, after EPA had initially proposed to regulate all sites disturbing more than one acre).

[46] The Industry Petitioners contend that EPA lacked authority to issue the Phase II regulation of construction sites based on a process EPA itself characterized as "separate and distinct" from the development of the

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EPA contends that the statute did not require it to base its designations exclusively on the § 402(p)(5) studies, and that it was in fact required to take account of information from other sources in promulgating the regulations. It argues that it based the Phase II Rule on conclusions reported in the § 402(p)(5) studies, but then appropriately supported these results with data described in the additional study requested by Congress in the Appropriations Act, comments submitted during the statutorily required notice-and-comment process, and other available information. To read the authorizing statute as limiting reliance to the § 402(p)(5) studies, EPA claims, would preclude it from relying on recommendations received through the separate, post-study requirement to "consult with State and local officials" under § 402(p)(6), and through the notice and comment process mandated by the APA, 5 U.S.C. § 553(b).

Respondent-intervenor NRDC adds that the Phase II Rule is consistent with the § 402(p)(5) studies reported in 1995, and moreover, that the Industry Petitioners lack standing to raise the "regulatory basis" claim because they cannot show the requisite injury. *See Friends of the Earth,* 528 U.S. at 180-81.

a. Standing. Industry Petitioners[47] contend that they have suffered injury in fact, because their members are

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Report to Congress. 64 Fed. Reg. at 68,732. They add that the Phase II Rule was not "based on" the 1999 Report ultimately requested by Congress in the Appropriations Act, since EPA's report in response was released on the very day that the final Phase II Rule was published.

[47] Since we have already determined that AF&PA lacks standing to raise any of its claims, *see* Section D above, this discussion pertains to the remaining Industry Petitioner, National Association of Home Builders.

now either automatically regulated by the permitting requirements or subject to future regulation (under the residual authority, discussed below) that otherwise would not have been authorized, and that this is a direct result of EPA's failure to adhere to the framework of the 1995 Report, which allegedly would have precluded these aspects of the Rule. NRDC contends that the Industry Petitioners lack standing because they cannot show that being subject to NPDES permitting is the causal result of the procedural injury they urge, and because they cannot base standing on hypothetical injury that may arise in the future.

NRDC argues that the injuries Petitioners allege are not consistent with the guidelines laid out in *Friends of the Earth,* 528 U.S. at 180-81. It insists that Petitioners' only possible claims of injury from the alleged "regulatory basis" violation are purported harm to members caused by the final Phase II Rule itself or harm to members caused by EPA's alleged failure to provide adequate notice of future regulatory requirements in the 1995 Report. However, NRDC contends that Petitioners have not suffered the requisite injury, because they had actual notice that EPA might regulate small construction sites, 63 Fed. Reg. at 1583, and they can show no chain of causation linking their alleged injury from the Rule itself to the actions challenged here.

NRDC's causation argument is complex. Although the Petitioners purport to challenge EPA's failure to follow all of the 1995 Report's recommendations in the final Phase II Rule, NRDC contends, they are really challenging the subsequent proceedings through which EPA developed the final Rule. Even if there were some unlawful variance between the 1995 report and final rule, NRDC continues,

the cause of that variance would have been some failure to abide by rulemaking standards during administrative proceedings that produced the text of the final Rule – not EPA's attention to sources of input other than the 1995 Report. NRDC maintains that these intervening acts of rulemaking (e.g., Phase II Subcommittee activities and the notice-and-comment process) break the requisite chain of causation between EPA's alleged failure to adhere to recommendations in the 1995 report and the flaws Petitioners allege in the Phase II Rule, which NRDC claims would have been due to "purportedly unlawful EPA decisions on the merits during the subsequent administrative proceedings." *See Northside Sanitary Landfill v. Thomas,* 804 F.2d 371, 381-84 (7th Cir. 1986) (finding no standing to challenge EPA statements concerning the fate of a hazardous waste facility when subsequent state administrative acts, not EPA comments, would determine the facility's actual fate).

We note that NRDC's standing arguments apply equally to the Municipal Petitioners, who can also assert only the harms resulting to members from the Rule itself or from a lack of notice, and that we are thus not only considering the standing of the Industry Petitioners but also that of the Municipal Petitioners to raise the "regulatory basis" claim.[48] That established, we find standing for both.

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[48] Although the issue of Municipal Petitioners' standing has not been raised by the parties, we are obliged to consider it to determine whether the case-or-controversy requirement of Article III is satisfied. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472, 488 n.4 (1980); *Juidice v. Vail,* 430 U.S. 327, 331 (1977).

NRDC essentially argues that petitioners lack standing because (1) they cannot show that being subject to NPDES permitting is the causal result of the procedural injury they urge, (2) they cannot claim any actual notice injury from the alleged procedural wrong because notice was actually given, and (3) they cannot claim standing based on hypothetical injury that may (or may not) arise from future regulation under the residual authority. We can readily agree with the latter two contentions. As discussed above, the "actual injury" requirement of Article III standing precludes judicial consideration of exactly the kind of hypothetical harm the Industry Petitioners allege may follow from use of Phase II authority for future designations of regional sources. *Friends of the Earth,* 528 U.S. at 180-81. If future Phase II designations cause identifiable injury to Petitioners, they will then be free to pursue that ripe claim. And because EPA clearly issued notice to all regulated parties that they may be subject to regulation under the proposed rule, 63 Fed. Reg. at 1568 (MS4s) and 1582 (construction), petitioners cannot show injury from lack of actual notice.

However, NRDC's causation argument is less persuasive. NRDC correctly argues that the petitioners cannot establish a definite chain of causation between the EPA's alleged failure to limit their regulatory basis to the § 402(p)(5) studies and the fact that they now must obtain permits. But this will almost always be true of petitions challenging an agency's failure to abide by statutory procedural requirements. Because all administrative decisionmaking following an alleged procedural irregularity could always be considered an intervening factor breaking the chain of causation, NRDC's interpretation of

the requisite chain of causation would dubiously shield administrative decisions from procedural review.

For this reason, we have held that the failure of an administrative agency to comply with procedural requirements in itself establishes sufficient injury to confer standing, even though the administrative result might have been the same had proper procedure been followed. *City of Davis v. Coleman,* 521 F.2d 661, 671 (9th Cir. 1975) (agency's failure to comply with National Environmental Policy Act's procedural requirements constituted injury sufficient to support standing of a geographically related plaintiff regardless of potentially similar regulatory outcome). In *City of Davis,* we noted that the standing inquiry represents "a broad test, but because the nature and scope of environmental consequences are often highly uncertain before study we think it an appropriate test." *Id.* A plaintiff who shows that a causal relation is "probable" has standing, even if the chain cannot be definitively established. *Johnson v. Stuart,* 702 F.2d 193, 195-96 (9th Cir. 1983) (school students and their parents had standing to challenge a statute that limited the texts that might be selected for teaching, even though it could not be shown whether any specific book had been rejected under this statute or for other reasons).

The Supreme Court has also acknowledged that standing may be established by harm resulting indirectly from the challenged acts, *Warth v. Seldin,* 422 U.S. 490, 504-05 (1975), and that causation may be established if the plaintiff shows a good probability that, absent the challenged action, the alleged harm would not have occurred, *Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 262-64 (1977).

Thus, although the petitioners cannot show with certainty that the alleged "regulatory basis" violation caused them to be wrongfully subjected to Phase II permitting requirements, we hold that they have alleged a procedural injury sufficient to support their standing to bring the claim.

b. Merits. Although we resolve the standing issue in favor of the petitioners, we nevertheless affirm the Rule against their claim that EPA violated procedural constraints implied by the authorizing statute, § 402(p)(6).

Congress intended EPA to use all sources of information in developing a comprehensive program to protect water quality to the maximum extent practicable. The statute unambiguously required EPA to base its regulations both on the § 402(p)(5) studies and on consultation with state and local officials. Congress enacted § 402 with full knowledge that EPA would also be required to take account of public comments during the notice and comment phase of administrative rulemaking prescribed by the APA.[49]

2. MS4s in Urbanized Areas

The Municipal Petitioners contend that the designation of small MS4s for Phase II regulation according to Census Bureau defined areas of population density ("urbanized areas") is arbitrary and capricious. They argue that EPA has not established that the Census Bureau's

[49] Even if the statute *were* ambiguous, we would defer to EPA's reasonable interpretation. *Chevron,* 467 U.S. at 843-44.

designation of urbanized areas is correlated with actual levels of pollution runoff in stormwater, and that EPA adopted the designations simply for administrative convenience. We affirm, because the record reflects a reasoned basis for EPA's decision. *See Marsh,* 490 U.S. at 378.

Conceding that the Preamble cites studies purporting to establish "a high correlation between the degree of development/urbanization and adverse impacts on receiving waters due to stormwater," 64 Fed. Reg. at 68,751, the Municipal Petitioners nevertheless contend that the record contains no "demonstrably correlated, *quantified* basis on which EPA may reasonably have concluded that any particular population, or any population density, *per se* establishes that all urban areas having that same characteristic in gross are necessarily appropriate for inclusion as Phase II sources." Pointing to *Leather Industry of America v. EPA,* 40 F.3d 392, 401 (D.C. Cir. 1994) (rejecting as arbitrary EPA's regulation of pollutant levels in the absence of data supporting a relationship between the caps and level of risk), Petitioners argue that EPA simply assumed the relationship Congress contemplated it would establish by the § 402(p)(5) studies.

EPA responds that it extensively documented the relationship between urbanization and harmful water quality impacts from stormwater runoff, pointing to its findings that the degree of surface imperviousness in an area directly corresponds to the degree of harmful downstream pollution from stormwater runoff, 64 Fed. Reg. at 68,724-27, and that it articulated a rational connection between these record facts and its decision to designate small MS4s serving areas of high population density ("urbanized areas") to protect water quality.

We treat EPA's decision with great deference because we are reviewing the agency's technical analysis and judgments, based on an evaluation of complex scientific data within the agency's technical expertise. *See Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 103 (1983); *see also Chem. Mfrs. Ass'n v. EPA,* 919 F.2d 158, 167 (D.C. Cir. 1990) ("It is not the role of courts to 'second-guess the scientific judgments of the EPA . . . .'"). We conclude that the record supports EPA's choice.

The statute simply called upon EPA to "designate stormwater discharges," other than those designated in Phase I, "to be regulated to protect water quality." 33 U.S.C. § 1342(p)(6). EPA did so, based on record evidence showing a compelling and widespread correlation between urban stormwater runoff and deleterious impacts on water quality. Petitioners' assertion that EPA failed to establish a "quantified" basis for its designation is inapposite. The statute did not require EPA to establish with pinpoint precision a numeric population threshold within urbanized areas that would justify regulation under Phase II. In areas implicating technical expertise and judgment, courts do not require "perfect stud[ies]" or data. *Sierra Club,* 167 F.3d at 662. EPA satisfied the *Leather Industries* standard by adopting a threshold consistent with the criterion of "protecting water quality," and did not assume, but instead sufficiently documented, the relationship between urbanization and harmful stormwater discharge.

3. Small Construction Sites

Industry and Municipal Petitioners also argue that EPA's decision to regulate under Phase II all construction sites disturbing between one and five acres of land ("small

construction sites") is arbitrary and unsupported by the record. We do not agree. *See Marsh,* 490 U.S. at 378.

a. Record Evidence. Municipal Petitioners claim that EPA arrived at the one-acre standard based not on factual findings in the record but instead as a reaction to the earlier Ninth Circuit remand of the Phase I five-acre designation. They allege that the one-acre standard is no more based on supporting data than the rejected five-acre standard, and is thus quantitatively arbitrary.

Industry Petitioners argue that EPA's findings do not support regulation of *all* small construction sites, but indicate only that small construction sites, taken cumulatively, may cause effects similar to large sites in a given area. They contend that EPA's conclusion that adverse effects are possible under certain circumstances cannot support categorical designation of all small construction sites nationwide, and that the Rule is arbitrary because (1) it is based on an analysis that fails to take account of the frequency of negative impacts, (2) it fails to take account of acknowledged factors that determine whether small construction activities cumulatively cause harm (such as the degree of development in a watershed at any given time), and (3) EPA has acknowledged that the actual water quality impact of construction sites of all sizes varies widely from area to area depending on climatological, geological, geographical, and hydrological influences.[50]

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[50] The Industrial Petitioners argue that although the Phase I authorizing statute required EPA to regulate all sources associated with "industrial activity," Congress expressly directed that the Phase II regulatory program be focused on sources that require regulation "to protect water quality." They assert that because EPA's rule ignores the

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Industry Petitioners further contend that the record does not support the designation of small sites, because almost all of the technical papers EPA relied on focused on larger sites or failed to take account of size,[51] and because the lack of an adequate factual basis for nationwide regulation of small sites makes the Phase II Rule arbitrary and capricious. *Am. Petroleum Inst. v. EPA,* 216 F.3d 50, 58 (D.C. Cir. 2000) (invalidating a solid waste rule because EPA "failed to provide a rational explanation for its decision" declining to exclude oilbearing waste waters from the statutory definition of solid waste).

EPA maintains that construction sites regulated under the Phase II Rule degrade water quality across the United States and that the administrative record unambiguously documents that harm. EPA disputes Petitioners' assertion that it failed to establish the need to regulate small sites nationwide, but also contends that it is not required to base every administrative decision on a precise quantitative analysis. *See Sierra Club,* 167 F.3d at 662

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variability of water quality impacts nationwide, the Rule is not appropriately targeted on the protection of water quality.

[51] Petitioners heavily critique two studies relied on by EPA that dealt specifically with the water quality impacts of small construction sites, noting that one concludes it is impossible to generalize about the impacts of small sites, Lee H. MacDonald, *Technical Justification for Regulating Construction Sites 1-5 Acres in Size,* July 22, 1997, and that the other merely concludes that small sites "can have" significant effects if erosion controls are not implemented, David W. Owens, et al., *Soil Erosion from Small Construction Sites.* Petitioners contend that the latter study was managed with no erosion controls, intentionally producing worst-case sediment runoff and unreasonable estimates of actual sediment yields for small sites nationwide. EPA vigorously defends the studies.

("EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem.").

EPA also disputes petitioners' assertions that data from studies involving larger construction sites are irrelevant to the Phase II Rule. EPA explains that discharges of sediment due to erosion are the result of the interaction of several factors including soils, slope, precipitation, and vegetation:

> For construction sites that are one acre or more, none of the environmental factors contributing to sediment discharges is dependent on the size of the site disturbed. A one-acre site can have the same combination of soils, slope, degree of disturbance and precipitation as a 100-acre site, and consequently can lose soil at the same rate . . . and discharge sediments in the same concentrations . . . as a 100-acre site.

EPA contends that it is thus reasonable to extrapolate data about small sites from studies of larger ones – and that such an extrapolation may even be forgiving, since small sites are currently less likely to have effective erosion and sedimentation control plans.[52]

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[52] NRDC adds that notwithstanding the clear interest of the National Association of Home Builders ("NAHB," one of the Industry Petitioners), NAHB's multi-year participation in the FACA Phase II Subcommittee Small Construction and No-Exposure Sites Work Group, and NAHB's own submission of detailed comments on the proposed Rule, NAHB failed to enter into the administrative record any study contradicting the proposition that small construction sites cause water quality problems. NRDC points to the record's showing that NAHB had itself proposed that regulation of construction sites of two acres or greater was appropriate, and contends that this is thus not a dispute

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Indeed, EPA argues that although adverse water quality impacts of small construction sites have been widely recognized, effective local erosion and sedimentation control programs have not been adopted in many areas.[53] Though not all watersheds are currently adversely effected by small construction sites,[54] EPA notes that the Phase II Rule acts "to protect water quality" both remedially and preventively, and argues that it need not quantify the cumulative effects of discharges from these sites or identify all watersheds that are currently harmed before acting to limit pollution from small sites.[55]

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over whether small construction sites should be regulated on a nationwide basis, but instead a technical disagreement over whether EPA should establish a one-acre threshold or a different threshold on a similar small scale.

[53] Whitney Brown and Deborah Caraco, *Controlling Stormwater Runoff Discharges from Small Construction Sites: A National Review,* Task 5 Final Report submitted by the Center for Watershed Protection to the EPA Office of Wastewater Management, March 1997, IP E.R. 633, 643.

[54] EPA adds that operators of small sites in areas unlikely to suffer adverse impacts may apply for a permit waiver if little or no rainfall is expected during the period of construction (the "rainfall erosivity waiver") or if regulation is unnecessary based on a location-specific evaluation of water quality (the "water quality waiver"). 64 Fed. Reg. at 68,776.

[55] EPA also implies permission to regulate for potential cumulative impacts of small sites from the past directive of this court. When the Phase I industrial discharge regulations were challenged, we found no record data to support that rule's exemption of construction activities on less than five acres and held that small sites did not categorically qualify for a *de minimis* exemption because "even small construction sites can have a significant impact on local water quality." *Natural Res. Def. Council,* 966 F.2d at 1306.

We reverse under the arbitrary and capricious standard only if the agency has relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision contrary to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. Petitioners' contention that EPA relied on factors Congress did not intend it to consider was rejected in our earlier discussion of the regulatory basis challenge. They submit no evidence that EPA failed to consider an important aspect of the problem. We cannot say that EPA's designation of small construction sites is implausible (especially given the support of twenty-some-odd studies of sedimentation from construction sites that EPA reviewed in promulgating the challenged regulations, 64 Fed. Reg. 68,728-31). We could remand this aspect of the Rule only if, as the petitioners urge, EPA's explanation for its decision to regulate small construction sites were contrary to the record evidence, and it is not.

Petitioners' primary contention is that evidence in the record suggests it is not possible to provide an explicit, quantitative link between small construction sites and an adverse effect on water quality. But even if this were so, EPA's decision to regulate preventively small construction sites "to protect water quality" is not inconsistent with the record. Petitioners contend that EPA's reliance on data from studies of large construction sites is insufficient to support EPA's designation of small sites, but EPA has adequately supported its contention that experts can reasonably extrapolate projected water quality impacts from large to small sites. We apply the substantial evidence

standard when reviewing the factual findings of an agency, *Dickinson v. Zurko,* 527 U.S. 150, 156-58 (1999),[56] and find it satisfied here.

Moreover, EPA is not required to conduct the "perfect study." *Sierra Club,* 167 F.3d at 662. We defer to an agency decision not to invest the resources necessary to conduct the perfect study, and we defer to a decision to use available data unless there is no rational relationship between the means EPA uses to account for any imperfections in its data and the situation to which those means are applied. *Id.; Am. Iron & Steel Inst. v. EPA,* 115 F.3d 979, 1004 (D.C. Cir. 1997). The record indicates a reasoned basis for EPA's decision that regulating small construction sites was necessary "to protect water quality" as required by § 402(p)(6).

b. Waivers. Industry Petitioners further contend that EPA's allowance of regulatory waivers for small construction sites not likely to cause adverse water quality impacts inappropriately supplements the permitting regulations.

Petitioners argue that EPA has the burden of establishing a comprehensive program to control sources as necessary to protect water quality, and that shifting the burden to individual contractors, businesses, and homeowners to prove they do not harm water quality falls short of meeting this statutory obligation. Citing *National Mining Association v. Babbitt,* 172 F.3d 906, 910 (D.C. Cir.

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[56] The "substantial evidence" standard requires a showing of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Edlund v. Massanari,* 253 F.3d 1152, 1156 (9th Cir. 2001).

1999), they argue that EPA's rebuttable regulatory presumption of water quality impact from small construction activity is unreasonable because the agency has established no scientific likelihood that any given small site will affect water quality. EPA defends the waiver approach as fair and efficient, and argues that the Industrial Petitioners are confusing arguments about the limits of presumptions in evidentiary hearings conducted under the APA.[57]

EPA is correct; the Phase II Rule creates no presumption applicable to an evidentiary hearing, and a regulation creating exemptions by waiver is reviewed under the familiar arbitrary and capricious standard. The use of waivers to allow permit exemptions for small sites unlikely to cause adverse impacts is reasonable under that standard.

c. Consistency. Industry Petitioners also argue that EPA's decision to regulate all small construction sites under the Phase II Rule is arbitrary and capricious because EPA applied a different standard in regulating small construction projects than it applied to other potential sources of stormwater runoff subject to Phase II regulation.

Petitioners contend that EPA decided not to designate other potential sources identified in the § 402(p)(5) studies because it determined that there are not "sufficient data . . . available at this time on which to make a determination of

[57] EPA further argues that even if the waiver provision were properly characterized as an evidentiary presumption, it should be sustained because the record demonstrates that the presumed fact of the water quality impact of small sites is more likely true than not.

potential adverse water quality impacts for the category of sources." 64 Fed. Reg. at 68,780. Petitioners contend this standard should have been applied to small construction sites as well, but EPA opted to regulate these sources despite an alleged lack of coherent data on small site impacts as a general category.

EPA counters, once again, that it did have adequate data to regulate small construction sites. It contends that construction sites of all sizes have greater erosion rates than almost any other land use, and thus are not similarly situated to the potential polluters that EPA chose not to regulate at this time.[58] These sources include secondary industrial activities (for example, maintenance of construction equipment or local trucking for an unregulated facility such as a grocery store) and other unregulated commercial activities (for example, car and truck rental facilities). 64 Fed. Reg. at 68,779. EPA reports that it decided not to categorically regulate these potential sources based both on available data about water quality impacts and on the extent to which potentially adverse water quality impacts are mitigated by existing regulations to which these sources are already subject. *Id.* at 68,780.

We find no error. *See Marsh,* 490 U.S. at 378. EPA acted reasonably in designating all small construction sites for Phase II regulation, and Industry Petitioners

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[58] EPA notes that the Phase II Rule empowers regional permitting authorities to regulate local sources of these types known to be responsible for harmful water quality impacts via the continuing "residual designation" authority (an aspect of the Rule that Petitioners also challenge).

point to no record evidence that the nature of pollutant contributions from small construction site discharge is sufficiently similar to pollutants from the non-regulated sources to support the analogy they seek to draw. *New Orleans Channel 20 v. FCC,* 830 F.2d 361, 366 (D.C. Cir. 1987) (an agency does not act irrationally when it treats parties differently, unless the parties are similarly situated). Sufficient evidence supports EPA's conclusion that small construction sites are not similar enough to these "other sources" to support petitioner's challenge.

G. Continuing ("Residual") Designation Authority

The Industry Petitioners argue that EPA acted improperly in retaining authority to designate future sources of stormwater pollution for Phase II regulation as needed to protect federal waters. We disagree.

The Phase II Rule preserves authority for EPA and authorized States to designate currently unregulated stormwater dischargers as requiring permits under the Rule if future circumstances indicate that they warrant regulation "to protect water quality" under the terms of § 402(p)(6). 40 C.F.R. § 122.26(a)(9). In the Phase II Preamble, EPA explains this aspect of the Rule:

> Under today's rule, EPA and authorized States continue to exercise the authority to designate remaining unregulated discharges composed entirely of stormwater for regulation on a case-by-case basis . . . . Individual sources are subject to regulation if EPA or the State, as the case may be, determines that the stormwater discharge from the source contributes to a violation of a water quality standard or is a significant contributor of

> pollutants to waters of the United States. This standard is based on the text of section CWA 402(p). In today's rule, EPA believes, as Congress did in drafting section CWA 402(p)(2)(E), that individual instances of stormwater discharge might warrant special regulatory attention, but do not fall neatly into a discrete, predetermined category. Today's rule preserves the regulatory authority to subsequently address a source (or category of sources) of stormwater discharges of concern on a localized or regional basis.

64 Fed. Reg. 68,781. The text of the Rule requires a discharger to obtain a permit if the NPDES permit authority determines that "stormwater controls are needed for the discharge based on wasteload allocations that are part of 'total maximum daily loads' (TMDLs[59]) that address the pollutant(s) of concern" or that "the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. §§ 122.26(a)(9)(i)(C)-(D).

1. Statutory Authority

The Industry Petitioners contend that this "residual" designation authority, which would allow a NPDES permitting authority to require at any future time a permit from any stormwater discharge not already regulated, is

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[59] TMDLs are pollutant loading limits established by NPDES permitting authorities under the Clean Water Act for waters that do not meet a water quality standard due to the presence of a pollutant. *See* 33 U.S.C. § 1313(d).

ultra vires. Although they concede that Congress authorized case-by-case designation in § 402(p)(2)(E),[60] they argue that this authority attached only during the permitting moratorium that ended in 1994, prior to the Phase II rulemaking. They object that EPA has impermissibly designated a category of "not yet identified" sources and preserved authority to regulate them on a case-by-case basis indefinitely into the future.[61]

Petitioners contend that § 402(p)(6)[62] cannot rescue the residual authority because it does not authorize case-by-case

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[60] This section enables a NPDES permitting authority to designate for regulation: "[a] discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E).

[61] Notably, Industry Petitioner NAHB itself took the position during Phase II Subcommittee proceedings that the power to designate additional sources survived the promulgation of the Phase II Rule. In a 1996 comment letter to EPA, NAHB asserted its understanding that "[t]he permitting authority still reserves the right to designate additional sources if they are shown to be a contributor of water quality impairment." NRDC Supplemental Excerpts of Record at 58.

[62] The full text of § 402(p)(6), which specifically authorizes the Phase II program, reads: "Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. § 1342(p)(6).

identification of discharges to be regulated, and that Congress, had it intended otherwise, would have included language in § 402(p)(6) similar to the case-by-case authority explicitly granted in § 402(p)(2)(E).[63] They also contend that continuing authority to designate sources based on waste load allocations that are part of TMDLs exceeds the scope of authority in § 402(p)(2), which nowhere mentions TMDLs. Finally, they argue that the categorical designation authorized by § 402(p)(6) is only permissible when based on the § 402(p)(5) studies and carried out in consultation with state and local authorities, but that the Rule allows future designations based on agency discretion unaccompanied by adequate demonstration that the source itself is a significant threat to water quality.

EPA counters that § 402(p)(6) authorized the designation, made on the basis of statutorily required sources of input and in consultation with the States, of a third class

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[63] Petitioners further argue that even if EPA could preserve the case-by-case authority conferred in § 402(p)(2)(E), that section confers authority only to regulate "a discharge" determined to threaten water quality, not a category of discharges. However, we agree with respondent-intervenor NRDC's argument that § 402(p)(2)(E) does not preclude EPA from designating entire categories of sources. Petitioners' argument follows from its reliance on the fact that § 402(p)(2)(E) refers to "discharge" in the singular rather than the plural to conclude that EPA may only designate sources meeting the § 402(p)(2)(E) description on a case-by-case basis. But all five of the § 402(p)(2)(5) categories refer to "discharge" in the singular, even in reference to discharges clearly intended for categorical regulation, like "a discharge from a municipal separate storm sewer system serving a population of 250,000 or more." 33 U.S.C. § 1342(p)(2)(C). The error in petitioners' interpretation is exposed by 1 U.S.C. § 1, which provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things."

of discharges to be identified on location-specific bases by the NPDES permitting authority. EPA contends that Petitioners mistake the source of its authority for continuing designations as arising only from § 402(p)(2), discounting the full scope of its authority under § 402(p)(6). EPA argues that it permissibly interpreted § 402(p)(6) as allowing the residual designation authority because its language does not expressly preclude it, and because such authority is consistent with (and arguably required by) that section's mandate to establish a "comprehensive program" to protect water quality from adverse stormwater discharges. EPA maintains that the structure of § 402(p) reflects "Congress' intent to assure regulation of all problematic stormwater discharges as expeditiously as reasonably possible – not to limit EPA to a one-time-only opportunity to designate discharges for regulation."

We review EPA's interpretation of the statute it administers with deference, *Royal Foods Co.*, 252 F.3d at 1106, and affirm this aspect of the Phase II Rule as a legitimate exercise of regulatory authority conferred by § 402(p). The residual designation authority is grounded both on § 402(p)(6), which broadly authorizes a comprehensive program to protect water quality, and on § 402(p)(2)(5), which authorizes case-by-case designation of certain polluters and categories of polluters.

While not a blank check, § 402(p)(6) authorizes a comprehensive program that allows regional designation of polluting discharges that compromise water quality locally, even if they have not been established as compromising water quality nationally at the time Phase II was promulgated. In allowing continuing designation authority, EPA permissibly designated a third category of dischargers subject to Phase II regulation – those established locally

as polluting U.S. waters – following all required studies and consultation with state and local officials. EPA reasonably determined that discharges other than those from small MS4s and construction sites were likely to require regulation "to protect water quality" in satisfaction of the § 402(p)(6) mandate. EPA reasonably determined that, although it lacked sufficient data to support nationwide, categorical designation of these sources, particularized data might support their designations on a more localized basis. EPA reasonably interpreted § 402(p)(6) as authorizing regional designation of sources and regional source categories, based on water quality standards including TMDLs.

Petitioners' § 402(p)(2)(5) argument (that EPA could not draw support for the residual designation authority from § 402(p)(2)(5) because such authority expired in 1994) is contradicted by the plain language of the statute. Respondent-intervenor NRDC correctly notes that § 402(p)(1) sets forth a permitting moratorium for stormwater discharges prior to 1994, and that § 402(p)(2) exempts certain categories of sources from that permitting moratorium, including those to be regulated on a case-by-case basis under § 402(p)(2)(5). Specifically, the statute provides that the 1994 date "shall not apply" to the five categories of discharges listed in § 402(p)(2). The termination of a moratorium that "shall not apply" to the continuing designation authority under § 402(p)(2)(5) cannot rescind EPA's authority to regulate sources in that category. Nothing in § 402(p) suggests that authority to designate these sources ends at any time, and EPA remains free to designate § 402(p)(2)(E) dischargers.

Finally, although Petitioners may be legitimately concerned that a permitting authority may designate a source without adequately establishing its eligibility, this

issue must be addressed in the context of an actual case or controversy. Whether a NPDES authority may impose permitting requirements on a discharger without an adequate finding of polluting activity is not yet ripe for judicial review. *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1141 (9th Cir. 2000) ("A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate.").

2. Nondelegation Doctrine

Industry Petitioners contend that EPA's interpretation of § 402(p) to allow the residual designation authority must be rejected because it would render the statute unconstitutional under the nondelegation doctrine. We deny petitioners' claim, both because it is not properly raised and because it rests on an interpretation explicitly overturned by the United States Supreme Court.

Petitioners base their contention on *American Trucking Ass'ns v. EPA,* 175 F.3d 1027, 1034 (D.C. Cir. 1999),[64] in which the D.C. Circuit remanded a regulation under the nondelegation doctrine because, although EPA had applied reasonable factors in establishing the air quality standards in question, the agency had articulated no "intelligible principle" to channel its application of these factors. *Id.* Petitioners argue that if § 402(p) authorizes a NPDES permitting authority to require Phase II permitting of any stormwater source deemed to be a "significant contributor"

[64] This case was reversed in relevant part by the Supreme Court in *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 476 (2000).

of pollutants to U.S. waters, then that grant of authority likewise constitutes an unconstitutional delegation of legislative authority because – as did the *American Trucking* delegation – it "leaves [EPA] free to pick any point" at which a regulatory burden will attach. *Id.* at 1037.

However, in reversing *American Trucking,* the Supreme Court rejected the notion that an agency has the power to interpret a statute so as to either save it from being, or transform it into, an unconstitutional delegation. *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 473 (2000). Whether a statute delegates legislative power "is a question for the courts, and an agency's [interpretation] has no bearing upon the answer." *Id.* Petitioner's argument to the contrary rests on the very reasoning in *American Trucking* that was overturned in *Whitman.* The relevant question is not whether EPA's interpretation is unconstitutional, but whether the statute itself is unconstitutional – a challenge Industry Petitioners do not raise.

But even if the challenge were properly raised, § 402(p) would, like the Clean Air Act standard-setting provision at issue in *Whitman,* survive constitutional review. The Supreme Court has upheld against nondelegation attacks many similar statutes establishing nonquantitative standards. *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 104 (1946) (upholding statute giving SEC authority to modify corporate structures so that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders"); *Yakus v. United States,* 321 U.S. 414, 419-20, 423-27 (1944) (upholding statute giving agency power to set prices that "will be generally fair and equitable"). In *Yakus,* the Court held that a statutory command to "effectuate the purposes" of the overall statutory scheme withstood

scrutiny. *Id.* Section 402(p)(6)'s directive "to protect water quality" summarizes the central purpose of the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). It establishes a determinate criterion of the kind the Supreme Court upheld in *Yakus* and *American Power & Light.*

3. Notice and Comment

Industry Petitioners also contend that, to the extent it allows the designation of entire categories of sources, rather than individual sources, the residual designation authority violates the APA, 5 U.S.C. § 553(b)(3), because EPA did not provide public notice that it was considering such a rule. *Ober v. EPA,* 84 F.3d 304, 315 (9th Cir. 1996) (invalidating EPA rule where it deviated from proposal); *Shell Oil Co. v. EPA,* 950 F.2d 741, 746-47 (D.C. Cir. 1991). Petitioners contend that while the proposed rule would have allowed case-by-case designation where an authority "determines that the discharge contributes to a violation," 63 Fed. Reg. at 1635 (proposing 40 C.F.R. § 122.26(a)(9)(i)(D)), the final rule authorizes case-by-case designation where "the discharge, or category of discharges within a geographic area, contributes to a violation," 40 C.F.R. § 122.26(a)(9)(i)(D).

EPA notes that it had proposed to promulgate continuing designation authority in some form, and points to elements in the proposed rule that explicitly envision the

categorical designation of sources at the local/watershed level. [65]

According to the "logical outgrowth" standard, a final regulation must be "in character with the original proposal and a logical outgrowth of the notice and comments." *Hodge,* 107 F.3d at 712. EPA emphasized that it was considering continuing designations based on watershed data rather than designating these sources on a national basis, and invited comment regarding this proposal. 63 Fed. Reg. at 1536. This supports the necessary relationship between the proposed and final rule.

H. Regulatory Flexibility Act

The Industry Petitioners contend that the Phase II Rule will impose substantial compliance costs on their members and other small entities, but that EPA failed to conduct the analysis required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-11. They argue that EPA seeks to excuse its noncompliance by falsely certifying that

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[65] "[T]oday's proposal would encourage [voluntary] control of stormwater discharges . . . unless the discharge (or category of discharges) is individually or locally designated as described in the following section. The necessary data to support designation could be available on a local, regional, or watershed basis and would allow the NPDES permitting authority to designate a category of sources or individual sources on a case-by-case basis. If sufficient nationwide data [becomes] available in the future, EPA could at that time designate additional categories of industrial or commercial sources on a national basis. EPA requests comment on the three-pronged analysis used to assess the need to designate additional industrial or commercial sources and invites suggestions regarding watershed-based designation." 63 Fed. Reg. at 1588.

the Rule does not have a significant impact on a substantial number of small entities. 64 Fed. Reg. at 68,800. We are not persuaded.

The RFA requires a federal agency to prepare a regulatory flexibility analysis and an assessment of the economic impact of a proposed rule on small business entities, 5 U.S.C. § 604, unless the agency certifies that the proposed rule will not have a "significant economic impact on a substantial number of small entities" and provides a factual basis for that certification, *id.* at § 605; *N.W. Mining Ass'n v. Babbitt,* 5 F. Supp. 2d 9, 15-16 (D.D.C. 1998).

EPA did certify that the Phase II Rule would not yield "significant impacts," 64 Fed. Reg. at 68,800, but Petitioners contend this certification is erroneous because (1) EPA treats as "not significant" costs that are in fact significant, and (2) EPA failed to account for the entire universe of small entities affected (including small home construction contractors) and all significant costs to those entities. They urge that the failure to consider a significant segment of the affected small entity community requires invalidation of the Rule, citing *North Carolina Fisheries Ass'n v. Daley,* 27 F. Supp. 2d 650, 659 (E.D. Va. 1998) (certification failed to comply with RFA where agency ignored several categories of affected small entities), and *Northwest Mining,* 5 F. Supp. 2d at 15 (RFA was violated where improper definition of small entity excluded analysis of affected entities).

EPA maintains that its certification was appropriate, and, moreover, that it has already voluntarily followed the additional RFA procedures that the Industry Petitioners now request. EPA argues that Petitioners have incorrectly specified the costs that the small entities they represent

will bear, referring erroneously to EPA's total annual compliance costs estimates for all entities, rather than to costs estimated for small entities as defined under the RFA. EPA maintains that it did consider economic impacts on small home construction contractors who might be denied discharge permits, and that it evaluated the annual costs of Phase II compliance associated with any land disturbance between one and five acres. 64 Fed. Reg. at 68,800-01.

Respondent-intervenor NRDC contends that Petitioners' reliance on measures of the aggregate impact of the Rule on small entities to determine compliance with the threshold test under the RFA fails as a matter of law because aggregate measures are not consistent with the statutory language setting out that test. NRDC notes that the plain language of § 605(b) sets out a three-component test indicating that EPA need not perform a regulatory flexibility analysis if it finds that the proposed rule will not have: (1) "a significant economic impact" on (2) "a substantial number" of (3) "small entities." 5 U.S.C. § 605(b). NRDC contends that EPA satisfied the statutory test, and that Petitioners' interpretation, which rewrites the test to omit the "substantial number" component, is erroneous.

We believe NRDC correctly interprets the statute, *Marsh,* 490 U.S. at 378, and that EPA reasonably certified that the Phase II Rule would not have a significant economic impact in compliance with the Regulatory Flexibility Act. We also conclude that, even if EPA had failed to properly comply with the procedural requirements of the RFA, its actual assessment of the Rule's economic impacts renders any defective compliance harmless error. In granting relief under RFA § 611, a court may order an

agency "to take corrective action consistent with" the RFA and APA, including remand to the agency, 5 U.S.C. § 611(a)(4)(A), but EPA has already conducted the economic analyses Petitioners seek when it convened the "Small Business Advocacy Review Panel" before publishing notice of the proposed rule. 64 Fed. Reg. at 68,801. That Panel evaluated the Rule and considered the comments of small entities on a number of issues, consistent with the procedures described in RFA § 603. *Id.* Appendix 5 of EPA's preamble to the proposed rule explained provisions that had been designed to minimize impacts on small entities, based on advice and recommendations from the Panel. 63 Fed. Reg. 1615, 64 Fed. Reg. 68,811. Modifications for small entities included alternative compliance and reporting mechanisms responsive to the resources of small entities, simplified procedures, performance rather than design standards, and waivers.

Any hypothetical noncompliance would thus have been harmless, since the available remedy would simply require performance of the economic assessments that EPA actually made. Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit. We affirm the Rule against this challenge.[66]

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[66] Our consideration of the issue at all may be gratuitous, since petitioners failed to submit timely comment disputing the adequacy of EPA's consideration of economic impacts on small businesses proposed at 63 Fed. Reg. at 1605-07. *United States v. L.A. Tucker Truck Lines,*

(Continued on following page)

III.

CONCLUSION

We conclude that the EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate action to comply with the Clean Water Act. We also remand so that EPA may consider in an appropriate proceeding the Environmental Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. We affirm all other aspects of the Phase II Rule against the statutory, administrative, and constitutional challenges raised in this action.

Petitions for Review GRANTED IN PART and DENIED IN PART.

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I concur in most of the majority's opinion, but I dissent from Section II.B, which remands the Phase II Rule because its system of general permits is "arbitrary and capricious." I believe EPA's design of a system of general

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344 U.S. 33, 37 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

permits supported by notices of intent was a reasonable exercise of EPA's administrative discretion. We must give deference to EPA's interpretation of the laws it is charged with enforcing, so long as EPA's reading of those laws is permissible. Because EPA acted reasonably in designing a National Pollutant Discharge Elimination System ("NPDES") based on general permits and supported by NOIs, I respectfully dissent from the court's decision to remand this portion of the Phase II Rule.

I

As the majority concedes, we evaluate EPA's interpretation of the Clean Water Act with deference. Majority Op. 13796. If Congress's intent is unclear as to whether a system of general permits supplemented by NOIs is allowed, we simply ask "whether EPA's interpretation is permissible." *Ober v. Whitman,* 243 F.3d 1190, 1193 (9th Cir. 2001).

II

As an initial matter, then, we must ask if Congress was clear in its intent concerning the propriety of a system of general permits augmented by NOIs.

Five legislative commands guide this inquiry. First, 33 U.S.C. § 1342(p)(6) charges EPA with creating a system to regulate stormwater discharges. Plainly, nothing in this section speaks to whether EPA may utilize a general permit approach in regulating stormwater discharge.

Second, 33 U.S.C. § 1311(a) makes it illegal to discharge pollutants "except as in compliance" with several sections of the Clean Water Act. Again, nothing in this

section addresses whether EPA may make use of general permits reinforced by NOIs.

Third, 33 U.S.C. § 1342 in general (as opposed to the limited charge in section 1342(p)(6) discussed above) authorizes EPA to issue NPDES permits, provided that the permits satisfy several conditions. But nothing in section 1342 prohibits the use of a system of general permits.

Fourth, the Clean Water Act mandates that "a copy of each permit application and each permit issued under" the NPDES permitting program be made available to the public for inspection and photocopying. 33 U.S.C. § 1342(j). The Act does not elaborate on this naked requirement. There is no explanation of the manner in which NPDES permits and applications are to be made publicly available. Nor does the Act define what constitutes a "permit" that would trigger these requirements.

And fifth, the Clean Water Act authorizes the issuance of an NPDES "permit" "after opportunity for public hearing." 33 U.S.C. § 1342(a)(1). The Act does not provide a definition of "permit," nor does it further detail what triggers the requirement of a public hearing.

In short, the Clean Water Act fails to address the propriety of a general permit system, or whether NOIs ought to be considered "permits." Therefore, we should uphold EPA's creation of a system of general permits buttressed by NOIs so long as it is "permissible." *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-44 (1984). Our duty to defer to EPA in such a situation is based on sound policy. Given the overwhelming challenge and complexity of the programs administered by federal agencies today, it is sensible to trust agencies with the design of those programs so long as

the programs are reasonable interpretations of congressional mandates.

The central issues regarding EPA's general permit system are whether the Clean Water Act allows such a system and whether NOIs should be considered "permits." The resolution of these issues requires a complicated weighing of policies (e.g., administrative streamlining vs. robust inquiry) that is precisely what agencies are designed to do and courts are without the resources or expertise to do. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction." *Chevron,* 467 U.S. at 843.

III

The Phase II Rule promulgates a system of general permits. EPA contemplated that these general permits will be issued on a watershed basis, with individual stormwater dischargers then filing NOIs to operate under general permits. The federal regulations implementing this system repeatedly emphasize that "[t]he use of general permits, instead of individual permits, reduces the administrative burden of permitting authorities, while also limiting the paperwork burden on regulated parties." 64 Fed. Reg. 68,722, 68,737, 68,762 (Dec. 8, 1999).

The use of a general permit system for the administration of the NPDES system has been considered and approved before. In *NRDC v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977), the District of Columbia Circuit considered a challenge to EPA's regulations under the Federal Water Pollution Control Act, which was the precursor to the Clean Water Act. In *Costle,* EPA sought approval of its

design for the NPDES system. EPA had issued regulations exempting broad categories of point sources from the requirement that an NPDES permit be obtained before discharging into federal waters. Part of EPA's rationale in creating the exempted categories was that otherwise EPA would be overwhelmed by the administrative burden of issuing NPDES permits. *Id.* at 1377-79. The *Costle* court affirmed the lower court's rejection of these exemptions because the legislation in question plainly required that all point sources obtain some kind of NPDES permit. *Id.* But in rejecting EPA's regulations, the *Costle* court discussed the options available to EPA in promulgating an NPDES system that was considerate of the enormous burden such a system could impose on EPA. *Id.* at 1380-81. In particular, the court recommended "the use of area or general permits. *The Act allows such techniques.* Area-wide regulation is one well-established means of coping with administrative exigency." *Id.* at 1381 (emphasis added).

Against this backdrop, EPA's creation of a general permit system was entirely permissible. And if the creation of a general permit system is permissible, then it does not matter whether NOIs are given a public airing.

The majority contends that the general permit system prevents EPA from fulfilling its duty to make sure that municipalities do not discharge pollutants in violation of the Clean Water Act. The majority reasons that by failing to require EPA review of NOIs, the Rule fails to ensure that a regulated MS4's stormwater pollution control program will satisfy the Clean Water Act requirement that the MS4 "reduce discharges to the maximum extent practicable." Majority Op. 13800. But the majority's analysis ignores the effects of the general permit. By filing

an NOI, a discharger obligates itself to comply with the limitations and controls imposed by the general permit under which it intends to operate. EPA mandates that all permits (including general permits) condition their issuance on satisfaction of pollution limitations imposed by the Clean Water Act. 40 C.F.R. § 122.44. In particular, EPA requires permits to satisfy the restrictions imposed by Clean Water Act section 307(a). *Id.* at § 122.44(b)(1). Therefore, the *general permit* imposes the obligations with which the discharger must comply (including applicable Clean Water Act standards), and EPA's decision not to review every NOI is not a failure to insure compliance with the Clean Water Act.

The majority also objects to EPA's general permit system because it fails to allow for sufficient public participation in the NOIs. Majority Op. 13802-05. The majority's position fails to give deference to EPA and imposes the majority's own wishes instead. EPA would have been justified in creating a system entirely reliant on general or area permits. Its imposition of NOIs is an indulgence to certain policy prerogatives, namely public involvement and the collection of additional information. But the power to create a general permit system necessarily implies the power to require subordinate steps for NOIs that do not quite reach the level of inquiry associated with actual permits.

IV

We function as an adjudicator of disputes, not as a policy-making body. Where an agency promulgates rules after a deliberative process, it is incumbent upon us to respect the agency's decisions or else risk trivializing the

function of that agency. In this case, EPA made a permissible decision to create a general permit program supported by NOIs. Therefore, I respectfully dissent from Section II.B of the majority's opinion.

United States Code Title 33, Section 1342(p)

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A)

A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B)

A discharge associated with industrial activity.

(C)

A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D)

A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E)

A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i)

may be issued on a system- or jurisdiction-wide basis;

(ii)

shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii)

shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering

methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the

State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A)

identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B)

determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C)

establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum,

(A)

establish priorities,

(B)

establish requirements for State stormwater management programs, and

(C)

establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

Federal Register/Vol. 64, No. 235/Wednesday, December 8, 1999/Rules and Regulations

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123, and 124

[FRL-6470-8]

RIN 2040-AC82

National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today's regulations (Phase II) expand the existing National Pollutant Discharge Elimination System (NPDES) storm water program (Phase I) to address storm water discharges from small municipal separate storm sewer systems (MS4s) (those serving less than 100,000 persons) and construction sites that disturb one to five acres. Although these sources are automatically designated by today's rule, the rule allows for the exclusion of certain sources from the national program based on a demonstration of the lack of impact on water quality, as well as the inclusion of others based on a higher likelihood of localized adverse impact on water quality. Today's regulations also exclude from the NPDES program storm water discharges from industrial facilities that have "no exposure" of industrial activities or materials to storm water. Finally, today's rule extends from August 7, 2001

until March 10, 2003 the deadline by which certain industrial facilities owned by small MS4s must obtain coverage under an NPDES permit. This rule establishes a cost-effective, flexible approach for reducing environmental harm by storm water discharges from many point sources of storm water that are currently unregulated.

EPA believes that the implementation of the six minimum measures identified for small MS4s should significantly reduce pollutants in urban storm water compared to existing levels in a cost-effective manner. Similarly, EPA believes that implementation of Best Management Practices (BMP) controls at small construction sites will also result in a significant reduction in pollutant discharges and an improvement in surface water quality. EPA believes this rule will result in monetized financial, recreational and health benefits, as well as benefits that EPA has been unable to monetize. Expected benefits include reduced scouring and erosion of streambeds, improved aesthetic quality of waters, reduced eutrophication of aquatic systems, benefit to wildlife and endangered and threatened species, tourism benefits, biodiversity benefits and reduced costs for siting reservoirs. In addition, the costs of industrial storm water controls will decrease due to the exclusion of storm water discharges from facilities where there is "no exposure" of storm water to industrial activities and materials.

DATES: This regulation is effective on February 7, 2000. The incorporation by reference of the rainfall erosivity factor publication listed in the rule is approved by the Director of the Federal Register as of February 7, 2000. For judicial review purposes, this final rule is promulgated as of 1:00 p.m. Eastern Standard Time, on December 22, 1999 as provided in 40 CFR 23.2.

* * *

3. Municipal Permit Requirements

a. Overview

i. Summary of Permitting Options. Today's rule outlines six minimum control measures that constitute the framework for a storm water discharge control program for regulated small MS4s that, when properly implemented, will reduce pollutants to the maximum extent practicable (MEP). These six minimum control measures are specified in § 122.34(b) and are discussed below in section "II.H.3.b, Program Requirements-Minimum Control Measures." All operators of regulated small MS4s are required to obtain coverage under an NPDES permit, unless the requirement is waived by the permitting authority in accordance with today's rule. Implementation of § 122.34(b) may be required either through an individual permit or, if the State or EPA makes one available to the facility, through a general permit. The process for issuing and obtaining these permits is discussed below in section "II.H.3.c, Application Requirements."

As an alternative to implementing a program that complies with the requirements of § 122.34, today's rule provides operators of regulated small MS4s with the option of applying for an individual permit under § 122.26(d). The permit application requirements in § 122.26 were originally drafted to apply to medium and large MS4s. Although EPA believes that the requirements of § 122.34 provide a regulatory option that is appropriate for most small MS4s, the operators of some small MS4s may prefer more individualized requirements. This alternative permitting option for regulated small MS4s that wish to develop their own program is discussed below in

section "II.H.3.c.iii. Alternative Permit Option." The second alternative permitting option for regulated small MS4s is to become co-permittees with a medium or large MS4 regulated under § 122.26(d), as discussed below in section "II.H.3.c.v. Joint Permit Programs."

ii. Water Quality-Based Requirements. Any NPDES permit issued under today's rule must, at a minimum, require the operator to develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from a regulated system to the MEP, to protect water quality, and satisfy the appropriate water quality requirements of the Clean Water Act (see MEP discussion in the following section). Absent evidence to the contrary, EPA presumes that a small MS4 program that implements the six minimum measures in today's rule does not require more stringent limitations to meet water quality standards. Proper implementation of the measures will significantly improve water quality. As discussed further below, however, small MS4 permittees should modify their programs if and when available information indicates that water quality considerations warrant greater attention or prescriptiveness in specific components of the municipal program. If the program is inadequate to protect water quality, including water quality standards, then the permit will need to be modified to include any more stringent limitations necessary to protect water quality.

Regardless of the basis for the development of the effluent limitations (whether designed to implement the six minimum measures or more stringent or prescriptive limitations to protect water quality), EPA considers narrative effluent limitations requiring implementation of

BMPs to be the most appropriate form of effluent limitations for MS4s. CWA section 402(p)(3)(b)(iii) expresses a preference for narrative rather than numeric effluent limits, for example, by reference to "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. 1342(p)(3)(B)(iii). EPA determines that pollutants from wet weather discharges are most appropriately controlled through management measures rather than end-of-pipe numeric effluent limitations. As explained in the Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits, issued on August 1, 1996 [61 FR 43761 (November 26, 1996), EPA believes that the currently available methodology for derivation of numeric water quality-based effluent limitations is significantly complicated when applied to wet weather discharges from MS4s (compared to continuous or periodic batch discharges from most other types of discharge). Wet weather discharges from MS4s introduce a high degree of variability in the inputs to the models currently available for derivation of water quality based effluent limitations, including assumptions about instream and discharge flow rates, as well as effluent characterization. In addition, EPA anticipates that determining compliance with any such numeric limitations may be confounded by practical limitations in sample collection.

In the first two to three rounds of permit issuance, EPA envisions that a BMP-based storm water management program that implements the six minimum measures will be the extent of the NPDES permit requirements for the large majority of regulated small MS4s. Because

the six measures represent a significant level of control if properly implemented, EPA anticipates that a permit for a regulated small MS4 operator implementing BMPs to satisfy the six minimum control measures will be sufficiently stringent to protect water quality, including water quality standards, so that additional, more stringent and/or more prescriptive water quality based effluent limitations will be unnecessary.

If a small MS4 operator implements the six minimum control measures in § 122.34(b) and the discharges are determined to cause or contribute to non-attainment of an applicable water quality standard, the operator needs to expand or better tailor its BMPs within the scope of the six minimum control measures. EPA envisions that this process will occur during the first two to three permit terms. After that period, EPA will revisit today's regulations for the municipal separate storm sewer program.

If the permitting authority (rather than the regulated small MS4 operator) needs to impose additional or more specific measures to protect water quality, then that action will most likely be the result of an assessment based on a TMDL or equivalent analysis that determines sources and allocations of pollutant(s) of concern. EPA believes that the small MS4's additional requirements, if any, should be guided by its equitable share based on a variety of considerations, such as cost effectiveness, proportionate contribution of pollutants, and ability to reasonably achieve wasteload reductions. Narrative effluent limitations in the form of BMPs may still be the best means of achieving those reductions.

See Section II.L, Water Quality Issues, for further discussion of this approach to permitting, consistent with

EPA's interim permitting guidance. Pursuant to CWA section 510, States implementing their own NPDES programs may develop more stringent or more prescriptive requirements than those in today's rule.

EPA's interpretation of CWA section 402(p)(3)(B)(iii) was recently reviewed by the Ninth Circuit in *Defenders of Wildlife, et al v. Browner,* No. 98-71080 (September 15, 1999). The Court upheld the Agency's action in issuing five MS4 permits that included water quality-based effluent limitations. The Court did, however, disagree with EPA's interpretation of the relationship between CWA sections 301 and 402(p). The Court reasoned that MS4s are not compelled by section 301(b)(1)(C) to meet all State water quality standards, but rather that the Administrator or the State may rely on section 402(p)(3)(B)(iii) to require such controls. Accordingly, the *Defenders of Wildlife* decision is consistent with the Agency's 1996 "Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits."

As noted, the 1996 Policy describes how permits would implement an iterative process using BMPs, assessment, and refocused BMPs, leading toward attainment of water quality standards. The ultimate goal of the iteration would be for water bodies to support their designated uses. EPA believes this iterative approach is consistent with and implements section 301(b)(1)(C), notwithstanding the Ninth Circuit's interpretation. As an alternative to basing these water quality-based requirements on section 301(b)(1)(C), however, EPA also believes the iterative approach toward attainment of water quality standards represents a reasonable interpretation of CWA section 402(p)(3)(B)(iii). For this reason, today's rule specifies that the "compliance target" for the design and implementation

of municipal storm water control programs is "to reduce pollutants to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA." The first component, reductions to the MEP, would be realized through implementation of the six minimum measures. The second component, to protect water quality, reflects the overall design objective for municipal programs based on CWA section 402(p)(6). The third component, to implement other applicable water quality requirements of the CWA, recognizes the Agency's specific determination under CWA section 402(p)(3)(B)(iii) of the need to achieve reasonable further progress toward attainment of water quality standards according to the iterative BMP process, as well as the determination that State or EPA officials who establish TMDLs could allocate waste loads to MS4s, as they would to other point sources.

EPA does not presume that water quality will be protected if a small MS4 elects not to implement all of the six minimum measures and instead applies for alternative permit limits under § 122.26(d). Operators of such small MS4s that apply for alternative permit limits under § 122.26(d) must supply additional information through individual permit applications so that the permit writer can determine whether the proposed program reduces pollutants to the MEP and whether any other provisions are appropriate to protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act.

iii. *Maximum Extent Practicable.* Maximum extent practicable (MEP) is the statutory standard that establishes the level of pollutant reductions that operators of regulated MS4s must achieve. The CWA requires that

NPDES permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods." CWA Section 402(p)(3)(B)(iii). This section also calls for "such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." EPA interprets this standard to apply to all MS4s, including both existing regulated (large and medium) MS4s, as well as the small MS4s regulated under today's rule.

For regulated small MS4s under today's rule, authorization to discharge may be under either a general permit or individual permit, but EPA anticipates and expects that general permits will be the most common permit mechanism. The general permit will explain the steps necessary to obtain permit authorization. Compliance with the conditions of the general permit and the series of steps associated with identification and implementation of the minimum control measures will satisfy the MEP standard. Implementation of the MEP standard under today's rule will typically require the permittee to develop and implement appropriate BMPs to satisfy each of the required six minimum control measures.

In issuing the general permit, the NPDES permitting authority will establish requirements for each of the minimum control measures. Permits typically will require small MS4 permittees to identify in their NOI the BMPs to be performed and to develop the measurable goals by which implementation of the BMPs can be assessed. Upon receipt of the NOI from a small MS4 operator, the NPDES permitting authority will have the opportunity to review

the NOI to verify that the identified BMPs and measurable goals are consistent with the requirement to reduce pollutants under the MEP standard, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. If necessary, the NPDES permitting authority may ask the permittee to revise their mix of BMPs, for example, to better reflect the MEP pollution reduction requirement. Where the NPDES permit is not written to implement the minimum control measures specified under § 122.34(b), for example in the case of an individual permit under § 122.33(b)(2)(ii), the MEP standard will be applied based on the best professional judgment of the permit writer.

Commenters argued that MEP is, as yet, an undefined term and that EPA needs to further clarify the MEP standards by providing a regulatory definition that includes recognition of cost considerations and technical feasibility. Commenters argued that, without a definition, the regulatory community is not adequately on notice regarding the standard with which they need to comply. EPA disagrees that affected MS4 permittees will lack notice of the applicable standard. The framework for the small MS4 permits described in this notice provides EPA's interpretation of the standard and how it should be applied.

EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis. EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, specific local concerns, and other aspects included in a comprehensive watershed plan. Other factors may include MS4 size, climate, implementation schedules, current ability to

finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance.

The pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process. Permit writers may evaluate small MS4 operator's proposed storm water management controls to determine whether reduction of pollutants to the MEP can be achieved with the identified BMPs.

EPA envisions application of the MEP standard as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit. EPA envisions that this process may take two to three permit terms.

One commenter observed that MEP is not static and that if the six minimum control measures are not achieving the necessary water quality improvements, then an MS4 should be expected to revise and, if necessary, expand its program. This concept, it is argued, must be clearly

part of the definition of MEP and thus incorporated into the binding and operative aspects of the rule. As is explained above, EPA believes that it is. The iterative process described above is intended to be sensitive to water quality concerns. EPA believes that today's rule contains provisions to implement an approach that is consistent with this comment.

b. Program Requirements'Minimum Control Measures

A regulated small MS4 operator must develop and implement a storm water management program designed to reduce the discharge of pollutants from their MS4 to protect water quality. The storm water management program must include the following six minimum measures.

i. Public Education and Outreach on Storm Water Impacts. Under today's final rule, operators of small MS4s must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps to reduce storm water pollution. The public education program should inform individuals and households about the problem and the steps they can take to reduce or prevent storm water pollution.

EPA believes that as the public gains a greater understanding of the storm water program, the MS4 is likely to gain more support for the program (including funding initiatives). In addition, compliance with the program will probably be greater if the public understands the personal responsibilities expected of them. Well-informed citizens can act as formal or informal educators to further

disseminate information and gather support for the program, thus easing the burden on the municipalities to perform all educational activities.

MS4s are encouraged to enter into partnerships with their States in fulfilling the public education requirement. It may be more cost-effective to utilize a State education program instead of numerous MS4s developing their own programs. MS4 operators are also encouraged to work with other organizations (*e.g.*, environmental, nonprofit and industry organizations) that might be able to assist in fulfilling this requirement.

The public education program should be tailored, using a mix of locally appropriate strategies, to target specific audiences and communities (particularly minority and disadvantaged communities). Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed and beach cleanups. Operators of MS4s may use storm water educational information provided by the State, Tribe, EPA, or environmental, public interest, trade organizations, or other MS4s. Examples of successful public education efforts concerning polluted runoff can be found in many State nonpoint source pollution control programs under CWA section 319.

The public education program should inform individuals and households about steps they can take to reduce storm water pollution, such as ensuring proper septic system maintenance, ensuring the use and disposal of landscape and garden chemicals including fertilizers

and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes. Additionally, the program could inform individuals and groups on how to become involved in local stream and beach restoration activities as well as activities coordinated by youth service and conservation corps and other citizen groups. Finally, materials or outreach programs should be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts. For example, MS4 operators should provide information to restaurants on the impact of grease clogging storm drains and to auto garages on the impacts of used oil discharges.

EPA received comments from representatives of State DOTs and U.S. Department of Defense (DOD) installations seeking exemption from the public education requirement. While today's rule does not exempt DOTs and military bases from the user education requirement, the Agency believes the flexibility inherent in the Rule addresses many of the concerns expressed by these commenters.

Certain DOT representatives commented that if their agencies were not exempt from the user education measure's requirements, they should at least be allowed to count DOT employee education as an adequate substitute. EPA supports the use of existing materials and programs, granted such materials and programs meet the rule's requirement that the MS4 user community (*i.e.*, the public) is also educated concerning the impacts of storm water discharges on water bodies and the steps to reduce storm water pollution.

Finally, certain DOD representatives requested that "public," as applied to their installations, be defined as the

resident and employee populations within the fence line of the facility. EPA agrees that the education effort should be directed toward those individuals who frequent the federally owned land (*i.e.*, residents and individuals who come there to work and use the MS4 facilities).

EPA also received a number of comments from municipalities stating that education would be more thorough and cost effective if accomplished by EPA on the national level. EPA believes that a collaborative State and local approach, in conjunction with significant EPA technical support, will best meet the goal of targeting, and reaching, specific local audiences. EPA technical support will include a tool box which will contain fact sheets, guidance documents, an information clearinghouse, and training and outreach efforts.

Finally, EPA received comments expressing concern that the public education program simply encourages the distribution of printed material. EPA is sensitive to this concern. Upon evaluation, the Agency made changes to the proposal's language for today's rule. The language has been changed to reflect EPA's belief that a successful program is one that includes a variety of strategies locally designed to reach specific audiences.

ii. Public Involvement/Participation. Public involvement is an integral part of the small MS4 storm water program. Accordingly, today's final rule requires that the municipal storm water management program must comply with applicable State and local public notice requirements. Section 122.34(b)(2) recommends a public participation process with efforts to reach out and engage all economic and ethnic groups. EPA believes there are two important reasons why the public should be allowed and

encouraged to provide valuable input and assistance to the MS4's program.

First, early and frequent public involvement can shorten implementation schedules and broaden public support for a program. Opportunities for members of the public to participate in program development and implementation could include serving as citizen representatives on a local storm water management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other preexisting programs, or participating in volunteer monitoring efforts. Moreover, members of the public may be less likely to raise legal challenges to a MS4's storm water program if they have been involved in the decision making process and program development and, therefore, internalize personal responsibility for the program themselves.

Second, public participation is likely to ensure a more successful storm water program by providing valuable expertise and a conduit to other programs and governments. This is particularly important if the MS4's storm water program is to be implemented on a watershed basis. Interested stakeholders may offer to volunteer in the implementation of all aspects of the program, thus conserving limited municipal resources.

EPA recognizes that there are a number of challenges associated with public involvement. One challenge is in engaging people in the public meeting and program design process. Another challenge is addressing conflicting viewpoints. Nevertheless, EPA strongly believes that these challenges can be addressed by use of an aggressive and

inclusive program. Section II.K. provides further discussion on public involvement.

A number of municipalities sought clarification from EPA concerning what the public participation program must actually include. In response, the actual requirements are minimal, but the Agency's *recommendations* are more comprehensive. The public participation program must only comply with applicable State and local public notice requirements. The remainder of the preamble, as well as the Explanatory Note accompanying the regulatory text, provide guidance to the MS4s concerning what elements a successful and inclusive program should include. EPA will provide technical support as part of the tool box (*i.e.*, providing model public involvement programs, conducting public workshops, *etc.*) to assist MS4 operators meet the intent of this measure.

Finally, the Agency encourages MS4s to seek public participation prior to submitting an NOI. For example, public participation at this stage will allow the MS4 to involve the public in developing the BMPs and measurable goals for their NOI.

iii. Illicit Discharge Detection and Elimination. Discharges from small MS4s often include wastes and wastewater from non-storm water "illicit" discharges. Illicit discharge is defined at 40 CFR 122.26(b)(2) as any discharge to a municipal separate storm sewer that is not composed entirely of storm water, except discharges pursuant to an NPDES permit and discharges resulting from fire fighting activities. As detailed below, other sources of nonstorm water, that would otherwise be considered illicit discharges, do not need to be addressed unless the operator of the MS4 identifies one or more of

them as a significant source of pollutants into the system. EPA's Nationwide Urban Runoff Program (NURP) indicated that many storm water outfalls still discharge during substantial dry periods. Pollutant levels in these dry weather flows were shown to be high enough to significantly degrade receiving water quality. Results from a 1987 study conducted in Sacramento, California, revealed that slightly less than one-half of the water discharged from a municipal separate storm sewer system was not directly attributable to precipitation runoff (U.S. Environmental Protection Agency, Office of Research and Development. 1993. *Investigation of Inappropriate Pollutant Entries Into Storm Drainage* Systems – A User's *Guide.* Washington, DC EPA 600/R–92/238.) A significant portion of these dry weather flows results from illicit and/or inappropriate discharges and connections to the municipal separate storm sewer system. Illicit discharges enter the system through either direct connections (*e.g.*, wastewater piping either mistakenly or deliberately connected to the storm drains) or indirect connections (*e.g.*, infiltration into the storm drain system or spills collected by drain inlets).

Under the existing NPDES program for storm water, permit applications for large and medium MS4s are to include a program description for effective prohibition against non-storm water discharges into their storm sewers (see 40 CFR 122.26 (d)(1)(v)(B) and (d)(1)(iv)(B)). Further, EPA believes that in implementing municipal storm water management plans under these permits, large and medium MS4 operators generally found their illicit discharge detection and elimination programs to be cost-effective. Properly implemented programs also significantly improved water quality.

In today's rule, any NPDES permit issued to an operator of a regulated small MS4 must, at a minimum, require the operator to develop, implement and enforce an illicit discharge detection and elimination program. Inclusion of this measure for regulated small MS4s is consistent with the "effective prohibition" requirement for large and medium MS4s. Under today's rule, the NPDES permit will require the operator of a regulated small MS4 to: (1) Develop (if not already completed) a storm sewer system map showing the location of all outfalls, and names and location of all waters of the United States that receive discharges from those outfalls; (2) to the extent allowable under State, Tribal, or local law, effectively prohibit through ordinance, or other regulatory mechanism, illicit discharges into the separate storm sewer system and implement appropriate enforcement procedures and actions as needed; (3) develop and implement a plan to detect and address illicit discharges, including illegal dumping, to the system; and (4) inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste.

The illicit discharge and elimination program need only address the following categories of non-storm water discharges if the operator of the small MS4 identifies them as significant contributors of pollutants to its small MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and

wetlands, dechlorinated swimming pool discharges, and street wash water (discharges or flows from fire fighting activities are excluded from the definition of illicit discharge and only need to be addressed where they are identified as significant sources of pollutants to waters of the United States). If the operator of the MS4 identifies one or more of these categories of sources to be a significant contributor of pollutants to the system, it could require specific controls for that category of discharge or prohibit the discharges completely.

Several comments were received on the mapping requirements of the proposal. Most comments said that more flexibility should be given to the MS4s to determine their mapping needs, and that resources could be better spent in addressing problems once the illicit discharges are detected. EPA reviewed the mapping requirements in the proposed rule and agrees that some of the information is not necessary in order to begin an illicit discharge detection and elimination program. Today's rule requires a map or set of maps that show the locations of all outfalls and names and locations of receiving waters. Knowing the locations of outfalls and receiving waters are necessary to be able to conduct dry weather field screening for non-storm water flows and to respond to illicit discharge reports from the public. EPA recommends that the operator collect any existing information on outfall locations (*e.g.*, review city records, drainage maps, storm drain maps), and then conduct field surveys to verify the locations. It will probably be necessary to "walk" (*i.e.* wade small receiving waters or use a boat for larger receiving waters) the streambanks and shorelines, and it may take more than one trip to locate all outfalls. A coding system should be used to mark and identify each outfall. MS4

operators have the flexibility to determine the type (*e.g.* topographic, GIS, hand or computer drafted) and size of maps which best meet their needs. The map scale should be such that the outfalls can be accurately located. Once an illicit discharge is detected at an outfall, it may be necessary to map that portion of the storm sewer system leading to the outfall in order to locate the source of the discharge.

Several comments requested clarification of the requirement to develop and implement a plan to detect and eliminate illicit discharges. EPA recommends that plans include procedures for the following: locating priority areas; tracing the source of an illicit discharge; removing the source of the discharge; and program evaluation and assessment. EPA recommends that MS4 operators identify priority areas (*i.e.*, problems areas) for more detailed screening of their system based on higher likelihood of illicit connections (*e.g.*, areas with older sanitary sewer lines), or by conducting ambient sampling to locate impacted reaches. Once priority areas are identified, EPA recommends visually screening outfalls during dry weather and conducting field tests, where flow is occurring, of selected chemical parameters as indicators of the discharge source. EPA's manual for investigation of inappropriate pollutant entries into the storm drainage system (EPA, 1993) suggests the following parameter list: specific conductivity, fluoride and/or hardness concentration, ammonia and/or potassium concentration, surfactant and/or fluorescence concentration, chlorine concentration, pH and other chemicals indicative of industrial sources. The manual explains why each parameter is a good indicator and how the information can be used to determine the type of source flow. The Agency is not recommending that fluoride

and chlorine, generally used to locate potable water discharges, be addressed under this program, therefore a short list of parameters may include conductivity, ammonia, surfactant and pH. Some MS4s have found it useful to measure for fecal coliform or E. coli in their testing program. Observations of physical characteristics of the discharge are also helpful such as flow rate, temperature, odor, color, turbidity, floatable matter, deposits and stains, and vegetation.

The implementation plan should also include procedures for tracing the source of an illicit discharge. Once an illicit discharge is detected and field tests provide source characteristics, the next step is to determine the actual location of the source. Techniques for tracing the discharge to its place of origin may include: following the flow up the storm drainage system via observations and/or chemical testing in manholes or in open channels; televising storm sewers; using infrared and thermal photography; conducting smoke or dye tests.

The implementation plan should also include procedures for removing the source of the illicit discharge. The first step may be to notify the property owner and specify a length of time for eliminating the discharge. Additional notifications and escalating legal actions should also be described in this part of the plan.

Finally, the implementation plan should include procedures for program evaluation and assessment. Procedures could include documentation of actions taken to locate and eliminate illicit discharges such as: number of outfalls screened, complaints received and corrected, feet of storm sewers televised, numbers of discharges and quantities of flow eliminated, number of dye or smoke

tests conducted. Appropriate records of such actions should be kept and should be submitted as part of the annual reports for the first permit term, as specified by the permitting authority (reports only need to be submitted in years 2 and 4 in later permits). For more on reporting requirements, see § 122.34(g).

EPA received comments regarding an MS4's legal authority beyond its jurisdictional boundaries to inspect or take enforcement against illicit discharges. EPA recognizes that illicit flows may originate in one jurisdiction and cross into one or more jurisdictions before being discharged at an outfall. In such instances, EPA expects the MS4 that detects the illicit flow to trace it to the point where it leaves their jurisdiction and notify the adjoining MS4 of the flow, and any other physical or chemical information. The adjoining MS4 should then trace it to the source or to the location where it enters their jurisdiction. The process of notifying the adjoining MS4 should continue until the source is located and eliminated. In addition, because any non-storm water discharge to waters of the U.S. through an MS4 is subject to the prohibition against unpermitted discharges pursuant to CWA section 301(a), remedies are available under the federal enforcement provisions of CWA sections 309 and 505.

EPA requested and received comments regarding the prohibition and enforcement provision for this minimum measure. Commenters specifically questioned the proposal that the operator only has to implement the appropriate prohibition and enforcement procedures "to the extent allowable under State or Tribal law." They raised concerns that by qualifying prohibition and enforcement procedures in this manner, the operator could altogether ignore this minimum measure where affirmative legal authority did

not exist. Comments suggested that EPA require States to grant authority to those municipalities where it did not exist. Other comments, however, stated that municipalities cannot exercise legal authority not granted to them under State law, which varies considerably from one State to another. EPA has no intention of directing State legislatures on how to allocate authority and responsibility under State law. As noted above, there is at least one remedy (the federal CWA) to control non-storm water discharges through MS4s. If State law prevents political subdivisions from controlling discharges through storm sewers, EPA anticipates common sense will prevail to provide those MS4 operators with the ability to meet the requirements applicable for their discharges.

One comment reinforced the importance of public information and education to the success of this measure. EPA agrees and suggests that MS4 operators consider a variety of ways to inform and educate the public which could include storm drain stenciling; a program to promote, publicize, and facilitate public reporting of illicit connections or discharges; and distribution of visual and/or printed outreach materials. Recycling and other public outreach programs could be developed to address potential sources of illicit discharges, including used motor oil, antifreeze, pesticides, herbicides, and fertilizers.

EPA received comments that State DOT's lack authority to implement this measure. EPA believes that most DOTs can implement most parts of this measure. If a DOT does not have the necessary legal authority to implement any part of this measure, EPA encourages them to coordinate their storm water management efforts with the surrounding MS4s and other State agencies. Many DOTs that are regulated under Phase I of this program are

copermittees with the local regulated MS4. Under today's rule, DOTs can use any of the options of § 122.35 to share their storm water management responsibilities.

EPA received comments requesting clarification of various terms such as "outfall" and "illicit discharge." One comment asked EPA to reinforce the point that a "ditch" could be considered an outfall. The term "outfall" is defined at 40 CFR 122.26(b)(9) as "a point source at the point where a municipal separate storm sewer discharges to waters of the United States * * * ". The term municipal separate storm sewer is defined at 40 CFR § 122.26(b)(8) as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) * * * ". Following the logic of these definitions, a "ditch" may be part of the municipal separate storm sewer, and at the point where the ditch discharges to waters of the United States, it would be an outfall. As with any determination about jurisdictional provisions of the CWA, however, final decisions require case specific evaluations of fact.

One commenter specifically requested clarification on the relationship between the term "illicit discharge" and non-storm water discharges from fire fighting. The comment suggested that it would be impractical to attempt to determine whether the flow from a specific fire (*i.e.*, during a fire) is a significant source of pollution. EPA intends that MS4s will address all allowable non-storm water flows categorically rather than individually. If an MS4 is concerned that flows from fire fighting are, as a category, contributing substantial amounts of pollutants to their system, they could develop a program to address those flows prospectively. The program may include an analysis

of the flow from several sources, steps to minimize the pollutant contribution, and a plan to work with the sources of the discharge to minimize any adverse impact on water quality. During the development of such a program, the MS4 may determine that only certain types of flows within a particular category are a concern, for example, fire fighting flows at industrial sites where large quantities of chemicals are present. In this example, a review of existing procedures with the fire department and/or hazardous materials team may reveal weaknesses or strengths previously unknown to the MS4 operator.

EPA received comments requesting modifications to the rule to include on-site sewage disposal systems (*i.e.*, septic systems) in the scope of the illicit discharge program. On-site sewage disposal systems that flow into storm drainage systems are within the definition of illicit discharge as defined by the regulations. Where they are found to be the source of an illicit discharge, they need to be eliminated similar to any other illicit discharge source. Today's rule was not modified to include discharges from on-site sewage disposal systems specifically because those sources are already within the scope of the existing definition of illicit discharge.

iv. Construction Site Storm Water Runoff Control. Over a short period of time, storm water runoff from construction site activity can contribute more pollutants, including sediment, to a receiving stream than had been deposited over several decades (see section I.B.3). Storm water runoff from construction sites can include pollutants other than sediment, such as phosphorus and nitrogen, pesticides, petroleum derivatives, construction chemicals, and solid wastes that may become mobilized when land surfaces are disturbed. Generally, properly implemented

and enforced construction site ordinances effectively reduce these pollutants. In many areas, however, the effectiveness of ordinances in reducing pollutants is limited due to inadequate enforcement or incomplete compliance with such local ordinances by construction site operators (Paterson, R.G. 1994. "Construction Practices: The Good, the Bad, and the Ugly." *Watershed Protection Techniques* 1(2)).

Today's rule requires operators of regulated small MS4s to develop, implement, and enforce a pollutant control program to reduce pollutants in any storm water runoff from construction activities that result in land disturbance of 1 or more acres (see § 122.34(b)(4)). Construction activity on sites disturbing less than one acre must be included in the program if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more.

The construction runoff control program of the regulated small MS4 must include an ordinance or other regulatory mechanism to require erosion and sediment controls to the extent practicable and allowable under State, Tribal or local law. The program also must include sanctions to ensure compliance (for example, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance). The program must also include, at a minimum: requirements for construction site operators to implement appropriate erosion and sediment control BMPS, such as silt fences, temporary detention ponds and diversions; procedures for site plan review by the small MS4 which incorporate consideration of potential water quality impacts; requirements to control other waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the

construction site that may adversely impact water quality; procedures for receipt and consideration of information submitted by the public to the MS4; and procedures for site inspection and enforcement of control measures by the small MS4.

Today's rule provides flexibility for regulated small MS4s by allowing them to exclude from their construction pollutant control program runoff from those construction sites for which the NPDES permitting authority has waived NPDES storm water small construction permit requirements. For example, if the NPDES permitting authority waives permit coverage for storm water discharges from construction sites less than 5 acres in areas where the rainfall erosivity factor is less than 5, then the regulated small MS4 does not have to include these sites in its storm water management program. Even if requirements for a discharge from a given construction site are waived by the NPDES permitting authority, however, the regulated small MS4 may still chose to control those discharges under the MS4's construction pollutant control program, particularly where such discharges may cause siltation problems in storm sewers. See Section II.I.1.b for more information on construction waivers by the permitting authority.

Some commenters suggested that the proposed construction minimum measure requirements went beyond the permit application requirements concerning construction for medium and large MS4s. In response, EPA has made changes to the proposed measure so that it more closely resembles the MS4 permit application requirements in existing regulations. For example, as described below, the Agency revised the proposed requirements for "pre-construction review of site

management plans" to require "procedures for site plan review."

One commenter expressed concerns that addressing runoff from construction sites within urbanized areas (through the small MS4 program) differently from construction sites outside urbanized areas (which will not be covered by the small MS4 program) will encourage urban sprawl. Today's rule, together with the existing requirements, requires all construction greater than or equal to 1 acre, unless waived, to be covered by an NPDES permit whether it is located inside or outside of an urbanized area (see § 122.26(b)(15)). Today's rule does not require small MS4s to control runoff from construction sites more stringently or prescriptively than is required for construction site runoff outside urbanized areas. Therefore, today's rule imposes no substantively different onsite controls on runoff of storm water from construction sites in urbanized areas than from construction sites outside of urbanized areas.

One commenter recommended that the small MS4 construction site storm water runoff control program address all storm water runoff from construction sites, not just the runoff into the MS4. The commenter also believed that MS4s should provide clear, objective standards for all construction sites. EPA agrees. Because today's rule only regulates discharges from the MS4, the construction pollutant control measure only requires small MS4 operators to control runoff into its system. As a practical matter, however, EPA anticipates that MS4 operators will find that regulation of all construction site runoff, whether they runoff into the MS4 or not, will prove to be the most simple and efficient program. The Agency may provide more specific criteria for construction site BMPs in the

forthcoming rule being developed under CWA section 402(m). See section II.D.1 of today's rule.

One commenter stated that there is no need for penalties at the local level by the small MS4 because the CWA already imposes sufficient penalties to ensure compliance. EPA disagrees and believes that enforcement and compliance at the local level is both necessary and preferable. Examples of sanctions, some not available under the CWA, include non-monetary penalties, monetary fines, bonding requirements, and denial of future or other local permits.

One commenter recommended that EPA should not include the requirement to control pollutants other than sediment from construction sites in this measure. EPA disagrees with this comment. The requirement is to control waste that "may cause adverse impacts on water quality." Such wastes may include discarded building materials, concrete truck washout, chemicals, pesticides, herbicides, litter, and sanitary waste. These wastes, when exposed to and mobilized by storm water, can contribute to water quality impairment.

The proposed rule required "procedures for pre-construction review of site management plans." EPA requested comment on expanding this provision to require both review and approval of construction site storm water plans. Many commenters expressed the concern that review and approval of site plans is not only costly and time intensive, but may unnecessarily delay construction projects and unduly burden staff who administer the local program. In addition, some commenters expressed confusion whether EPA proposed pre-construction review for all site management plans or only higher priority sites. To

address these comments, and be consistent with the permit application requirements for larger MS4s, EPA changed "procedures for pre-construction review of site management plans" to "procedures for site plan review." Today's rule requires the small MS4 to develop procedures for site plan review so as to incorporate consideration of adverse potential water quality impacts. Procedures should include review of site erosion and sediment control plans, preferably before construction activity begins on a site. The objective is for the small MS4 operator and the construction site operator to address storm water runoff from construction activity early in the project design process so that potential consequences to the aquatic environment can be assessed and adverse water quality impacts can be minimized or eliminated.

One commenter requested that EPA delete the requirement for "procedures for receipt and consideration of information submitted by the public" because it went beyond existing storm water requirements. Another commenter stated that establishing a separate process to respond to public inquiries on a project is a burden to small communities, especially if the project has gone through an environmental review. One commenter requested clarification of this provision. EPA has retained this requirement in today's final rule to require some formality in the process for addressing public inquiries regarding storm water runoff from construction activities. EPA does not intend that small MS4s develop a separate, burdensome process to respond to every public inquiry. A small MS4 could, for example, simply log public complaints on existing storm water runoff problems from construction sites and pass that information on to local

inspectors. The inspectors could then investigate complaints based on the severity of the violation and/or priority area.

One commenter believed that the proposed requirement of "regular inspections during construction" would require every construction project to be inspected more than once by the small MS4 during the term of a construction project. EPA has deleted the reference to "regular inspections." Instead, the small MS4 will be required to "develop procedures for site inspection and enforcement of control measures." Procedures could include steps to identify priority sites for inspection and enforcement based on the nature and extent of the construction activity, topography, and the characteristics of soils and receiving water quality.

In order to avoid duplication of small MS4 construction requirements with NPDES construction permit requirements, today's rule adds § 122.44(s) to recognize that the NPDES permitting authority can incorporate qualifying State, Tribal, or local erosion and sediment control requirements in NPDES permits for construction site discharges. For example, a construction site operator who complies with MS4 construction pollutant control programs that are referenced in the NPDES construction permit would satisfy the requirements of the NPDES permit. See section II.I.1.d for more information on incorporating qualifying programs by reference into NPDES construction permits. This provision has no impact on, or direct relation to, the small MS4 operator's responsibilities under the construction site storm water runoff control minimum measure. Conversely, under § 122.35(b), the permitting authority may recognize in the MS4's permit that another governmental entity, or the permitting

authority itself, is responsible for implementing one or more of the minimum measures (including construction site storm water runoff control), and not include this measure in the small MS4's permit. In this case, the other governmental entity's program must satisfy all of the requirements of the omitted measure.

v. Post-Construction Storm Water Management in New Development and Redevelopment. The NURP study and more recent investigations indicate that prior planning and designing for the minimization of pollutants in storm water discharges is the most cost-effective approach to storm water quality management. Reducing pollutant concentrations in storm water after the discharge enters a storm sewer system is often more expensive and less efficient than preventing or reducing pollutants at the source. Increased human activity associated with development often results in increased pollutant loading from storm water discharges. If potential adverse water quality impacts are considered from the beginning stages of a project, new development and redevelopment provides more opportunities for water quality protection. For example, minimization of impervious areas, maintenance or restoration of natural infiltration, wetland protection, use of vegetated drainage ways, and use of riparian buffers have been shown to reduce pollutant loadings in storm water runoff from developed areas. EPA encourages operators of regulated small MS4s to identify specific problem areas within their jurisdictions and initiate innovative solutions and designs to focus attention on those areas through local planning.

In today's rule at § 122.34(b)(5), NPDES permits issued to an operator of a regulated small MS4 will require the operator to develop, implement, and enforce a program

to address storm water runoff from new development and redevelopment projects that result in land disturbance of greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4. Specifically, the NPDES permit will require the operator of a regulated small MS4 to: (1) Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for the community; (2) use an ordinance, or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law; (3) ensure adequate long-term operation and maintenance of BMPs; and (4) ensure that controls are in place that would minimize water quality impacts. EPA intends the term "redevelopment" to refer to alterations of a property that change the "footprint" of a site or building in such a way that results in the disturbance of equal to or greater than 1 acre of land. The term is not intended to include such activities as exterior remodeling, which would not be expected to cause adverse storm water quality impacts and offer no new opportunity for storm water controls.

EPA received comments requesting guidance and clarification of the rule requirements. The scope of the comments ranged from general requests for more details on how MS4 operators should accomplish the four requirements listed above, to specific requests for information regarding transfer of ownership for structural controls, as well as ongoing responsibility for operation and maintenance. By the term "combination" of BMPs, EPA intends a combination of structural and/or non-structural BMPs. For this requirement, the term "combination" is meant to

emphasize that multiple BMPs should be considered and adopted for use in the community. A single BMP generally cannot significantly reduce pollutant loads because pollutants come from many sources within a community. The BMPs chosen should: (1) Be appropriate for the local community; (2) minimize water quality impacts; and (3) attempt to maintain pre-development runoff conditions. In choosing appropriate BMPs, EPA encourages small MS4 operators to participate in locally-based watershed planning efforts which attempt to involve a diverse group of stakeholders. Each new development and redevelopment project should have a BMP component. If an approach is chosen that primarily focuses on regional or non-structural BMPs, however, then the BMPs may be located away from the actual development site (*e.g.*, a regional water quality pond).

Non-structural BMPs are preventative actions that involve management and source controls such as: (1) Policies and ordinances that provide requirements and standards to direct growth to identified areas, protect sensitive areas such as wetlands and riparian areas, maintain and/or increase open space (including a dedicated funding source for open space acquisition), provide buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; (2) policies or ordinances that encourage infill development in higher density urban areas, and areas with existing storm sewer infrastructure; (3) education programs for developers and the public about project designs that minimize water quality impacts; and (4) other measures such as minimization of the percentage of impervious area after development, use of measures to minimize directly connected impervious areas, and source control

measures often thought of as good housekeeping, preventive maintenance and spill prevention. Detailed examples of non-structural BMPs follow.

Preserving open space may help to protect water quality as well as provide other benefits such as recharging groundwater supplies, detaining storm water, supporting wildlife and providing recreational opportunities. Although securing funding for open space acquisition may be difficult, various funding mechanisms have been used. New Jersey uses a portion of their State sales tax (voter approved for a ten year period) as a stable source of funding to finance the preservation of historic sites, open space and farmland. Colorado uses part of the proceeds from the State lottery to acquire and manage open space. Some local municipalities use a percentage of the local sales tax revenue to pay for open space acquisition (*e.g.*, Jefferson County, CO has had an open space program in place since 1977 funded by a 0.50 percent sales tax). Open space can be acquired in the form of: fee simple purchase; easements; development rights; purchase and sellback or leaseback arrangements; purchase options; private land trusts; impact fees; and land dedication requirements. Generally, fee simple purchases provide the highest level of development control and certainty of preservation, whereas the other forms of acquisition may provide less control, though they would also generally be less costly.

Cluster development, while allowing housing densities comparable to conventional zoning practice, concentrates housing units in a portion of the total site area which provides for greater open space, recreation, stream protection and storm water control. This type of development, by reducing lot sizes, can protect sensitive areas and result in

less impervious surface, as well as reduce the cost for roads and other infrastructure.

Minimizing directly connected impervious areas (DCIAs) is a drainage strategy that seeks to reduce paved areas and directs storm water runoff to landscaped areas or to structural controls such as grass swales or buffer strips. This strategy can slow the rate of runoff, reduce runoff volumes, attenuate peak flows, and encourage filtering and infiltration of storm water. It can be made an integral part of drainage planning for any development (Urban Drainage and Flood Control District, Denver, CO. 1992. *Urban Storm Drainage Criteria Manual, Volume 3 – Best Management Practices*). The Urban Drainage and Flood Control District manual describes three levels for minimizing DCIAs. At Level 1 all impervious surfaces are made to drain over grass-covered areas before reaching a storm water conveyance system. Level 2 adds to Level 1 and replaces street curb and gutter systems with low-velocity grass-lined swales and pervious street shoulders. In addition to Levels 1 and 2, Level 3 over-sizes swales and configures driveway and street crossing culverts to use grass-lined swales as elongated detention basins.

Structural BMPs include: (1) Storage practices such as wet ponds and extended-detention outlet structures; (2) filtration practices such as grassed swales, sand filters and filter strips; and (3) infiltration practices such as infiltration basins and infiltration trenches.

EPA recommends that small MS4 operators ensure the appropriate implementation of the structural BMPs by considering some or all of the following: (1) Pre-construction review of BMP designs; (2) inspections during construction to verify BMPs are built as designed; (3)

post-construction inspection and maintenance of BMPs; and (4) sanctions to ensure compliance with design, construction or operation and maintenance (O&M) requirements of the program.

EPA cautions that certain infiltration systems such as dry wells, bored wells or tile drainage fields may be subject to Underground Injection Control (UIC) program requirements (see 40 CFR Part 144.12.). To find out more about these requirements, contact your state UIC Program, or call EPA's Safe Drinking Water Hotline at 1-800-426-4791.

In order to meet the third post-construction requirement (ensuring adequate long-term O&M of BMPs), EPA recommends that small MS4 operators evaluate various O&M management agreement options. The most common options are agreements between the MS4 operator and another party such as post-development landowners (*e.g.*, homeowners' associations, office park owners, other government departments or entities), or regional authorities (*e.g.*, flood control districts, councils of government). These agreements typically require the post-construction property owner to be responsible for the C&M and may include conditions which: allow the MS4 operator to be reimbursed for O&M performed by the MS4 operator that is the responsibility of the property owner but is not performed; allow the MS4 operator to enter the property for inspection purposes; and in some cases specify that the property owner submit periodic reports.

In providing the guidance above, EPA intends the requirements in today's rule to be consistent with the permit application requirements for large MS4s for post-construction controls for new development and

redevelopment. MS4 operators have significant flexibility both to develop this measure as appropriate to address local concerns, and to apply new control technologies as they become available. Storm water pollution control technologies are constantly being improved. EPA recommends that MS4s be responsive to these changes, developments or improvements in control technologies. EPA will provide more detailed guidance addressing the responsibility for long-term O&M of storm water controls in guidance materials. The guidance will also provide information on appropriate planning considerations, structural controls and non-structural controls. EPA also intends to develop a broad menu of BMPs as guidance to ensure flexibility to accommodate local conditions.

EPA received comments suggesting that requirements for new development be treated separately from redevelopment in the rule. The comment stressed that new development on raw land presents fewer obstacles and more opportunities to incorporate elements for preventing water quality impacts, whereas redevelopment projects are constrained by space limitations and existing infrastructure. Another comment suggested allowing waivers from the redevelopment requirements if the redevelopment does not result in additional adverse water quality impacts, and where BMPs are not technologically or economically feasible. EPA recognizes that redevelopment projects may have more site constraints which narrow the range of appropriate BMPs. Today's rule provides small MS4 operators with the flexibility to develop requirements that may be different for redevelopment projects, and may also include allowances for alternate or off-site BMPs at certain redevelopment projects. Non-structural BMPs may

be the most appropriate approach for smaller redevelopment projects.

EPA received comments requesting clarification on what is meant by "pre-development" conditions within the context of redevelopment. Pre-development refers to runoff conditions that exist onsite immediately before the planned development activities occur. Pre-development is not intended to be interpreted as that period before any human-induced land disturbance activity has occurred.

EPA received comments on the guidance language in the proposed rule and preamble which suggest that implementation of this measure should "attempt to maintain pre-development runoff conditions" and that "post-development conditions should not be different than pre-development conditions in a way that adversely affects water quality." Many comments expressed concern that maintaining pre-development runoff conditions is impossible and cost-prohibitive, and objected to any reference to "flow" or increase in volume of runoff. Other comments support the inclusion of this language in the final rule. Similar references in today's rule relating to pre-development runoff conditions are intended as *recommendations* to *attempt* to maintain pre-development runoff conditions. With these recommendations, EPA intends to prevent water quality impacts resulting from increased discharges of pollutants, which may result from increased volume of runoff. In many cases, consideration of the increased flow rate, velocity and energy of storm water discharges following development unavoidably must be taken into consideration in order to reduce the discharge of pollutants, to meet water quality standards and to prevent degradation of receiving streams. EPA recommends that municipalities consider these factors when

developing their post-construction storm water management program.

Some comments said that the quoted phrases in the paragraph above are directives that imply federal land use control, which they argue is beyond the authority of the CWA. EPA recognizes that land use planning is within the authority of local governments.

EPA disagrees, however, with the implication that today's rule dictates any such land use decisions. The requirement for small MS4 operators to develop a program to address discharges resulting from new development and redevelopment is essentially a pollution prevention measure. The Rule provides the MS4 operator with flexibility to determine the appropriate BMPs to address local water quality concerns. EPA recognizes that these program goals may not be applied to every site, and expects that MS4s will develop an appropriate combination of BMPs to be applied on a site-by-site, regional or watershed basis.

vi. Pollution Prevention/Good Housekeeping for Municipal Operations. Under today's final rule, operators of MS4s must develop and implement an operation and maintenance program ("program") that includes a training component and has the ultimate goal of preventing or reducing storm water from municipal operations (in addition to those that constitute storm water discharges associated with industrial activity). This measure's emphasis on proper O&M of MS4s and employee training, as opposed to requiring the MS4 to undertake major new activities, is meant to ensure that municipal activities are performed in the most efficient way to minimize contamination of storm water discharges.

The program must include government employee training that addresses prevention measures pertaining to municipal operations such as: parks, golf courses and open space maintenance; fleet maintenance; new construction or land disturbance; building oversight; planning; and storm water system maintenance. The program can use existing storm water pollution prevention training materials provided by the State, Tribe, EPA, or environmental, public interest, or trade organizations.

EPA also encourages operators of MS4s to consider the following in developing a program: (1) Implement maintenance activities, maintenance schedules, and long-term inspection procedures for structural and non-structural storm water controls to reduce floatables and other pollutants discharged from the separate storm sewers; (2) implement controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, waste transfer stations, fleet or maintenance shops with outdoor storage areas, and salt/sand storage locations and snow disposal areas operated by the MS4; (3) adopt procedures for the proper disposal of waste removed from the separate storm sewer systems and areas listed above in (2), including dredge spoil, accumulated sediments, floatables, and other debris; and (4) adopt procedures to ensure that new flood management projects are assessed for impacts on water quality and existing projects are assessed for incorporation of additional water quality protection devices or practices. Ultimately, the effective performance of the program measure depends on the proper maintenance of the BMPs, both structural and non-structural. Without proper maintenance, BMP performance declines significantly over time. Additionally, BMP

neglect may produce health and safety threats, such as structural failure leading to flooding, undesirable animal and insect breeding, and odors. Maintenance of structural BMPs could include: replacing upper levels of gravel; dredging of detention ponds; and repairing of retention basin outlet structure integrity. Maintenance of non-structural BMPs could include updating educational materials periodically.

EPA emphasizes that programs should identify and incorporate existing storm water practices and training, as well as non-storm water practices or programs that have storm water pollution prevention benefits, as a means to avoid duplication of efforts and reduce overall costs. EPA recommends that MS4s incorporate these new obligations into their existing programs to the greatest extent feasible and urges States to evaluate MS4 programs with programmatic efficiency in mind. EPA designed this minimum control measure as a modified version of the permit application requirements for medium and large MS4s described at 40 CFR 122.26(d)(2)(iv), in order to provide more flexibility for these smaller MS4s. Today's requirements provide for a consistent approach to control pollutants from O&M among medium, large, and regulated small MS4s.

By properly implementing a program, operators of MS4s serve as a model for the rest of the regulated community. Furthermore, the establishment of a long-term program could result in cost savings by minimizing possible damage to the system from floatables and other debris and, consequently, reducing the need for repairs.

EPA received comments requesting clarification of what this measure requires. Certain municipalities

expressed concern that the measure has the potential to impose significant costs associated with EPA's requirement that operators of MS4s consider implementing controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, and salt/sand storage locations and snow disposal areas operated by the municipality. EPA disagrees that a requirement to *consider* such controls will impose considerable costs.

One commenter objected to the preamble language from the proposal suggesting that EPA does not expect the MS4 to undertake new activity. While it remains the Agency's expectation that major new activity will not be required, the MEP process should drive MS4s to incorporate the measure's obligations into their existing programs to achieve the pollutant reductions to the maximum extent practicable.

Certain commenters requested a definition for "municipal operations." EPA has revised the language to more clearly define municipal operations. Questions may remain concerning whether discharges from specific municipal activities constitute discharges associated with industrial activities (requiring NPDES permit authorization according to the requirements for industrial storm water that apply in that State) or from municipal operations (subject only to the controls developed in the MS4 control program). Even though there may be different substantive requirements that apply depending on the source of the discharge, EPA has modified the deadlines for permit coverage so that all the regulated municipally owned and operated sources become subject to permit requirements on the same date. The deadline is the same for permit coverage for this minimum measure as for

permit coverage for municipally owned/operated industrial sources.

c. Application Requirements

An NPDES permit that authorizes the discharge from a regulated small MS4 may take the form of either an individual permit issued to one or more facilities as co-permittees or a general permit that applies to a group of MS4s. For reasons of administrative efficiency and to reduce the paperwork burden on permittees, EPA expects that most discharges from regulated small MS4s will be authorized under general permits. These NPDES general permits will provide specific instructions on how to obtain coverage, including application requirements. Typically, such application requirements will be satisfied by the submission of a Notice of Intent (NOI) to be covered by the general permit. In this section, EPA explains the small MS4 operator's application requirements for obtaining coverage under a NPDES permit for storm water.

i. Best Management Practices and Measurable Goals, Section 122.34(d) of today's rule requires the operator of a regulated small MS4 that wishes to implement a program under § 122.34 to identify and submit to the NPDES permitting authority a list of the best management practices ("BMPs") that will be implemented for each minimum control measure in their storm water management program. They also must submit measurable goals for the development and implementation of each BMP. The BMPs and the measurable goals must be included either in an NOI to be covered under a general permit or in an individual permit application.

The operator's submission must identify, as appropriate, the months and years in which the operator will undertake actions required to implement each of the minimum control measures, including interim milestones and the frequency of periodic actions. The Agency revised references to "starting and completing" actions from the proposed rule because many actions will be repetitive or ongoing. The submission also must identify the person or persons responsible for implementing or coordinating the small MS4 storm water program. See § 122.34(d). The submitted BMPs and measurable goals become enforceable according to the terms of the permit. The first permit can allow the permittee up to five years to fully implement the storm water management program.

Several commenters opposed making the measurable goals enforceable permit conditions. Some suggested that a permittee should be able to change its goals so that BMPs that are not functioning as intended can be replaced. EPA agrees that a permittee should be free to switch its BMPs and corresponding goals to others that accomplish the minimum measure or measures. The permittee is required to implement BMPs that address the minimum measures in § 122.34(b). If the permittee determines that its original combination of BMPs are not adequate to achieve the objectives of the municipal program, the MS4 should revise its program to implement BMPs that are adequate and submit to the permitting authority a revised list of BMPs and measurable goals. EPA suggests that permits describe the process for revising BMPs and measurable goals, such as whether the permittee should follow the same procedures as were required for the submission of the original NOI and whether the permitting authority's approval is necessary

prior to the permittee implementing the revised BMPs. The permittee should indicate on its periodic report whether any BMPs and measurable goals have been revised since the last periodic report.

Some commenters expressed concern that making the measurable goals enforceable would encourage the development of easily attained goals and, conversely, discourage the setting of ambitious goals. Others noted that it is often difficult to determine the pollutant reduction that can be achieved by BMPs until several years after implementation. Much of the opposition to the enforceability of measurable goals appears to have been based on a mistaken understanding that measurable goals must consist of pollutant reduction targets to be achieved by the corresponding BMPs.

Today's rule requires the operator to submit either measurable goals that serve as BMP design objectives or goals that quantify the progress of implementation of the actions or performance of the permittee's BMPs. At a minimum, the required measurable goals should describe specific actions taken by the permittee to implement each BMP and the frequency and the dates for such actions. Although the operator may choose to do so, it is not required to submit goals that measure whether a BMP or combination of BMPs is effective in achieving a specific result in terms of storm water discharge quality. For example, a measurable goal might involve a commitment to inspect a given number of drainage areas of the collection system for illicit connections by a certain date. The measurable goal need not commit to achieving a specific amount of pollutant reduction through the elimination of illicit connections. Other measurable goals could include the date by which public education materials would be

developed, a certain percentage of the community participating in a clean-up campaign, the development of a mechanism to address construction site runoff, and a reduction in the percentage of imperviousness associated with new development projects.

To reduce the risk that permittees will develop inadequate BMPs, EPA intends to develop a menu of BMPs to assist the operators of regulated small MS4s with the development of municipal programs. States may also develop a menu of BMPs. Today's rule provides that the measurable goals that demonstrate compliance with the minimum control measures in §§ 122.34(b)(3) through (b)(6) do not have to be met if the State or EPA has not issued a menu of BMPs at the time the MS4 submits its NOI. Commenters pointed out that the proposed rule would have made the measurable goals unenforceable if the menu of BMPs was not available, but the proposal was silent as to the enforceability of the implementation of BMPs. Today's rule clarifies that the operators are not free to do nothing prior to the issuance of a menu of BMPs; they still must make a good faith effort to implement the BMPs designed to comply with each measure. See § 122.34(d)(2). The operators would not, however, be liable for failure to meet its measurable goals if a menu of BMPs was not available at the time they submit their NOI.

The proposed rule provision in § 123.35 stated that the "[f]ailure to issue the menu of BMPs would not affect the legal status of the general permit." This concept is included in the final rule in § 122.34(d)(2)'s clarification that the permittee still must comply with other requirements of the general permit.

Unlike the proposed rule, today's rule does not require that each BMP in the menu developed by the State or EPA be regionally appropriate, cost-effective and field-tested. Various commenters criticized those criteria as unworkable, and one described them as "ripe for ambiguity and abuse." Other commenters feared that the operators of regulated small MS4s would never be required to achieve their goals until menus were developed that were cost-effective, field-tested and appropriate for every conceivable subregion.

While some municipal commenters supported the requirement that a menu of BMPs be made available that included BMPs that had been determined to be regionally appropriate, field-tested and cost-effective, others raised concerns that they would be restricted to a limited menu. Some commenters supported such a detailed menu because they thought they would only be able to select BMPs that were on the menu, while others thought that it was the permitting authority's responsibility to develop BMPs narrowly tailored to their situation. In response, EPA notes that the operators will not be restricted to implementing only, or all of, the BMPs included on the menu. Since the menu does not require permittees to implement the BMPs included on the menu, it is also not necessary to apply the public notice and other procedures that some commenters thought should be applied to the development of the menu of BMPs.

The purpose of the BMP menu is to provide guidance to assist the operators of regulated small MS4s with the development and refinement of their local program, not to limit their options. Permittees may implement BMPs other than those on the menu unless a State restricts its permittees to specific BMPs. To the extent possible, EPA

will develop a menu of BMPs that describes the appropriateness of BMPs to specific regions, whether the BMPs have been field-tested, and their approximate costs. The menu, however, is not intended to relieve permittees of the need to implement BMPs that are appropriate for their specific circumstances.

If there are no known relevant BMPs for a specific circumstance, a permittee has the option of developing and implementing pilot BMPs that may be better suited to their circumstances. Where BMPs are experimental, the permittee should consider committing to measurable goals that address its schedule for implementing its selected BMPs rather than goals of achieving specific pollutant reductions. If the BMPs implemented by the permittee do not achieve the desired objective, the permittee may be required to commit to different or revised BMPs.

As stated in § 123.35(g), EPA is committed to issuing a menu of BMPs prior to the deadline for the issuance of permits. This menu would serve as guidance for all operators of regulated small MS4s nationwide. After developing the initial menu of BMPs, EPA intends to periodically modify, update, and supplement the menu of BMPs based on the assessments of the MS4 storm water program and research. States may rely on EPA's menu of BMPs or issue their own. If States develop their own menus, they would constitute additional guidance (or perhaps requirements in some States) for the operators to follow. Several commenters were confused by the proposed rule language that stated that States must provide or issue a menu of BMPs and, if they fail to do so, EPA "may" do so. Some read this language as not requiring either EPA or the State to develop the menu. EPA had intended that it would develop

a menu and that States could either provide the EPA developed menu or one developed by the State.

EPA has dropped the proposed language that States "must" develop the menu of BMPs. Some commenters thought that it was inappropriate to require States to issue guidance. A menu of BMPs issued by either EPA or a permittee's State will satisfy the condition in § 122.34(d) that a regulatory authority provide a menu of BMPs. A State could require its permittees to follow its menu of BMPs provided that they are adequate to implement § 122.34(b).

Several commenters raised concerns that operators of small MS4s could be required to submit their BMPs and measurable goals before EPA or the State has issued a menu of BMPs. EPA has assumed primary responsibility for developing a menu of BMPs to minimize the possibility of this occurring. Should a general permit be issued before a menu of BMPs is available, the permit writer would have the option of delaying the date by which the identification of the BMPs and measurable goals must be submitted to the permitting authority until some time after a menu of BMPs is available.

Several municipal commenters raised concerns that they would begin to develop a program only to be later told by the permitting authority or challenged in a citizen suit that their BMPs were inadequate. They expressed a need for certainty regarding what their permit required. Several commenters suggested that EPA require permitting authorities to approve or disapprove the submitted BMPs and measurable goals. EPA disagrees that formal approval or disapproval by the permitting authority is needed.

EPA acknowledges that the lack of a formal approval process does place on the permittee some responsibility for designing and determining the adequacy of its BMPs. Once the permittee has submitted its BMPs to the permitting authority as part of its NOI, it must implement them in order to achieve the corresponding measurable goals. EPA does not believe that this results in the uncertainty to the extent expressed by some commenters or unduly expose the permittee to the risk of citizen suit. If the permit is very specific regarding what the permittee must do, then the uncertainty is eliminated. If the permit is less prescriptive, the permittee has greater latitude in determining for itself what constitutes an adequate program. A citizen suit could impose liability on the permittee only if the program that it develops and implements clearly does not satisfy the requirements of the general permit. EPA believes today's approach strikes a balance between the competing goals of providing certainty as to what constitutes an adequate program and providing flexibility to the permittees.

Commenters were divided on whether five years was a reasonable and expeditious schedule for a MS4 to implement its program. Some thought that it was an appropriate amount of time to allow for the development and implementation of adequate programs. One questioned whether the permittee had to be implementing all of its program within that time, and suggested that there may be cases where a permitting authority would need flexibility to allow more time. One commenter suggested that five years is too long and would amount to a relaxation of implementation in their area. EPA believes it will take considerable time to complete the tasks of initially developing a program, commencing to implement it, and

achieving results. EPA notes, however, that full implementation of an appropriate program must occur as expeditiously as possible, and not later than five years.

EPA solicited comment on how an NOI form might best be formatted to allow for measurable goal information (*e.g.*, through the use of check boxes or narrative descriptions) while taking into account the Agency's intention to facilitate computer tracking. All commenters supported the development of a checklist NOI, but most noted that there would need to be room for additional information to cover unusual situations. One noted that, while a summary of measurable goals might be reduced to one sheet, attachments that more fully described the program and the planned BMPs would be necessary. EPA agrees that in most cases a "checklist" will not be able to capture the information on what BMPs a permittee intends to implement and its measurable goals for their implementation. EPA will continue to consider whether to develop a model NOI form and make it available for permitting authorities that choose to use it. What will be required on an MS4's NOI, however, is more extensive than what is usually required on an NOI, so a "form" NOI for MS4s may be impractical.

ii. Individual Permit Application for a § 122.34(b) program. In some cases, an operator of a regulated small MS4s may seek coverage under an individual NPDES permit, either because it chooses to do so or because the NPDES permitting authority has not made the general permit option available to that source. For small MS4s that are to implement a § 122.34(b) program in today's rule, EPA is promulgating simplified individual permit application requirements at § 122.33(b)(2)(i). Under the simplified individual permit application requirements, the

operator submits an application to the NPDES permitting authority that includes the information required under § 122.21(f) and an estimate of square mileage served by the small MS4. They are also required to supply the BMP and measurable goal information required under § 122.34(d). Consistent with CWA section 308 and analogous State law, the permitting authority could request any additional information to gain a better understanding of the system and the areas draining into the system.

Commenters suggested that the requirements of § 122.21(f) are not necessarily applicable to a small MS4. One suggested that it was not appropriate to require the following information: a description of the activities conducted by the applicant which require it to obtain an NPDES permit; the name, mailing address, and location of the facility; and up to four Standard Industrial Classification ("SIC") codes which best reflect the principal products or services provided by the facility. In response, EPA notes that the requirements in § 122.21(f) are generic application requirements applicable to NPDES applicants. With the exception of the SIC code requirement, EPA believes that they are applicable to MS4s. In the SIC code portion of the standard application, the applicant may simply put "not applicable."

One commenter asked that EPA clarify whether § 122.21(f)(5)'s requirement to indicate "whether the facility is located on Indian lands," referred to tribal lands, Indian country, or Indian reservations. For some local governments this is a complex issue with no easy "yes" or "no" answer. See the discussion in the Section II.F in the proposal to today's rule regarding what tribal lands are subject to the federal trust responsibility for purposes of the NPDES program.

One commenter suggested that the application should not have to list the permits and approvals required under § 122.21(f)(6). EPA notes that the applicant must only list the environmental permits that the applicant has received that cover the small MS4. The applicant is not required to list permits for other operations conducted by the small MS4 operator (*e.g.*, for an operation of an airport or landfill). Again, in most cases the applicant could respond "not applicable" to this portion of the application.

One commenter suggested that the topographic map requirement of § 122.21(f)(7) was completely different from, and significantly more onerous than, the mapping requirement outlined in the proposed rule at § 122.34(b)(3)(i). EPA agrees and has modified the final rule to clarify that a map that satisfies the requirements of § 122.34(b)(3)(i) also satisfies the map requirements for MS4 applicants seeking individual permits under § 122.33(b)(2)(i).

EPA is adding a new paragraph to § 122.44(k) to clarify that requirements to implement BMPs developed pursuant to CWA 402(p) are appropriate permit conditions. While such conditions could be included under the existing provision in § 122.44(k)(3) for "practices reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA," EPA believes it is clearer to specifically list in § 122.44(k) BMPs that implement storm water programs in light of the frequency with which they are used as effluent limitations.

iii. Alternative Permit Options / Tenth Amendment. As an alternative to implementing a program that addresses each of the six minimum measures according to the requirements of § 122.34(b), today's rule provides the

operators of regulated small MS4s with the option of applying for an individual permit under existing § 122.26(d). *See* § 122.33(b)(2)(ii). If a system operator does not want to be held accountable for implementation of each of the minimum measures, an individual permit option under § 122.33(b)(2)(ii) remains available. (As explained in the next section of this preamble, § 122.35(b) also provides an opportunity for relief from permit obligations for some of the minimum measures, but that relief exists within the framework of the minimum measures.)

EPA originally drafted the individual permit application requirements in § 122.26(d) to apply to medium and large MS4s. Today's rule abbreviates the individual permit application requirements for small MS4s. Although EPA believes that the storm water management program requirements of § 122.34, including the minimum measures, provide the most appropriate means to control pollutants from most small MS4s, the Agency does recognize that the operators of some small MS4s may prefer more individualized permit requirements. Among other possible reasons, an operator may seek to avoid having to "regulate" third parties discharging into the separate storm sewer system. Alternatively, an operator may determine that structural controls, such as constructed wetlands, are more appropriate or effective to address the discharges that would otherwise be addressed under the construction and/or development/redevelopment measures.

Some MS4s commenters alleged that an absolute requirement to implement the minimum measures violates the Tenth Amendment to the U.S. Constitution. While EPA disagrees that requiring MS4s to implement the minimum measures would violate the Constitution, today's rule does provide small MS4s with the option of

developing more individualized measures to reduce the pollutants and pollution associated with urban storm water that will be regulated under today's rule.

Some commenters specifically objected that § 122.34's minimum measures for small MS4s violate the Tenth Amendment insofar as they require the operators of MS4s to regulate third parties. The minimum measures include requirements for small MS4 operators to prohibit certain non-storm water discharges, control storm water discharges from construction greater than one acre, and take other actions to control third party sources of storm water discharges into their MS4s. Commenters also argued that it was inappropriate for EPA to require local governments to enact ordinances that will consume local revenues and put local governments in the position of bearing the political responsibility for implementing the program. One commenter argued that EPA was prohibited from conditioning the issuance of an NPDES permit upon the small MS4 operators waiving their constitutional right to be free from such requirements to regulate third parties. The Agency replies to each comment in turn.

Because the rule does rely on local governments – who operate municipal separate storm sewer systems – to regulate discharges from third parties into storm sewers, EPA acknowledges that the rule implicates the Tenth Amendment and constitutional principles of federalism. EPA disagrees, however, that today's rule is inconsistent with federalism principles. [As political subdivisions of States, municipalities enjoy the same protections as States under the Tenth Amendment.]

The Supreme Court has interpreted the Tenth Amendment to preclude federal actions that compel States

or their political subdivisions to enact or administer a federal regulatory program. *See New York v. United States,* 505 U.S. 144 (1992); *Printz v. United States,* 117 S.Ct. 2365 (1997). The Printz case, however, did acknowledge that the restriction does not apply when federal requirements of general applicability – requirements that regulate all parties engaging in a particular activity – do not excessively interfere with the functioning of State governments when those requirements are applied to States (or their political subdivisions). *See Printz,* 117 S.Ct. at 2383.

Today's rule imposes a federal requirement of general applicability, namely, the requirement to obtain and comply with an NPDES permit, on municipalities that operate a municipal separate storm sewer system. By virtue of this rule, the permit will require the municipality/storm sewer operator to develop a storm water control program. The rule specifies the components of the control program, which are primarily "management'-type controls, for example, municipal regulation of third party storm water discharges associated with construction, as well as development and redevelopment, when those discharges would enter the municipal system.

Unlike the circumstances reviewed in the *New York* and *Printz* cases, today's rule merely applies a generally applicable requirement (the CWA permit requirement) to municipal point sources. The CWA establishes a generally applicable requirement to obtain an NPDES permit to authorize point source discharge to waters of the United States. Because municipalities own and operate separate storm sewers, including storm sewers into which third parties may discharge pollutants, NPDES permits may

require municipalities to control the discharge of pollutants into the storm sewers in the first instance. Because NPDES permits can impose end-of-pipe numeric effluent limits, narrative effluent limits in the form of "management" program requirements are also within the scope of Clean Water Act authority. As noted above, however, EPA believes that such narrative limitations are the most appropriate form of effluent limitation for these types of permits. For municipal separate storm sewer permits, CWA section 402(p)(3)(B)(iii) specifically authorizes "controls to reduce pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

The Agency did not design the minimum measures in § 122.34 to "commandeer" state regulatory mechanisms, but rather to reduce pollutant discharges from small MS4s. The permit requirement in CWA section 402 is a requirement of general applicability. The operator of a small MS4 that does not prohibit and/or control discharges into its system essentially accepts "title" for those discharges. At a minimum, by providing free and open access to the MS4s that convey discharges to the waters of the United States, the municipal storm sewer system enables water quality impairment by third parties. Section 122.34 requires the operator of a regulated small MS4 to control a third party only to the extent that the MS4 collection system receives pollutants from that third party and discharges it to the waters of the United States. The operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties. The Agency concedes that administration of a municipal

program will consume limited local revenues for implementation; but those consequences stem from the municipal operator's identity as a permitted sewer system operator. The Tenth Amendment does not create a blanket municipal immunity from generally applicable requirements. Development of a program based on the minimum measures and implementation of that program should not "excessively interfere" with the functioning of municipal government, especially given the "practicability" threshold under CWA section 402(p)(3)(B)(iii).

As noted above, today's rule also allows regulated small MS4s to opt out of the minimum measures approach. The individual permit option provides for greater flexibility in program implementation and also responds to the comment about requiring a municipal permit applicant's waiver of any arguable constitutional rights. The individual permit option responds to questions about the rule's alleged unconstitutionality by more specifically focusing on the pollutants discharged from municipal point sources. Today's rule gives operators of MS4s the option to seek an individual permit that varies from the minimum measures/management approach that is otherwise specified in today's rule. Even if the minimum measures approach was constitutionally suspect, a requirement that standing alone would violate constitutional principles of federalism does not raise concerns if the entity subject to the requirement may opt for an alternative action that does not raise a federalism issue.

For municipal system operators who seek to avoid third party regulation according to all or some of the minimum measures, § 122.26(d) requires the operator to submit a narrative description of its storm water sewer system and any existing storm water control program, as

well as the monitoring data to enable the permit writer to develop appropriate permit conditions. The permit writer can then develop permit conditions and limitations that vary from the six minimum measures prescribed in today's rule. The information will enable the permit writer to develop an NPDES permit that will result in pollutant reduction to the maximum extent practicable. *See NRDC v. EPA,* 966 F.2d at 1308, n17. If determined appropriate under CWA section 402(p)(3)(B)(iii), for example BMPs to meet water quality standards, the permit could also incorporate any more stringent or prescriptive effluent limits based on the individual permit application information.

For small MS4 operators seeking an individual permit, both Part 1 and Part 2 of the application requirements in § 122.26(d)(1) and (2) are required to be submitted within 3 years and 90 days of the date of publication of this **Federal Register** notice. Some of the information required in Part 1 will necessarily have to be developed by the permit applicant prior to the development of Part 2 of the application. The permit applicant should coordinate with its permitting authority regarding the timing of review of the information.

The operators of regulated small MS4s that apply under § 122.26(d) may apply to implement certain of the § 122.34(b) minimum control measures, and thereby focus the necessary evaluation for additional limitations on alternative controls to the § 122.34(b) measures that the small MS4 will not implement. The permit writer may determine "equivalency" for some or all of the minimum measures by developing a rough estimate of the pollutant reduction that would be achieved if the MS4 implemented the § 122.34 minimum measure and to incorporate that

pollutant reduction estimate in the small MS4's individual permit as an effluent limitation. The Agency recognizes that, based on current information, any such estimates will probably have a wide range. Anticipation of this wide range is one of the reasons EPA believes MS4 operators need flexibility in determining the mix of BMPs (under the minimum measures) to achieve water quality objectives. Therefore, for example, if a system operator seeks to employ an alternative that involves structural controls, wide ranges will probably be associated with gross pollutant reduction estimates. Permit writers will undoubtedly develop other ways to ensure that permit limits ensure reduction of pollutants to the maximum extent practicable.

Small MS4 operators that pursue this individual permit option do not need to submit details about their future program requirements (*e.g.*, the MS4's future plans to obtain legal authority required by §§ 122.26(d)(1)(ii) and (d)(2)). A small MS4 operator might elect to supply such information if it intends for the permit writer to take those plans into account when developing the small MS4's permit conditions.

Several operators of small MS4s commented that they currently lacked the authority they would need to implement one or more of the minimum measures in § 122.34(b). Today's rule recognizes that the operators of some small MS4s might not have the authority under State law to implement one or more of the measures using, for example, an ordinance or other regulatory mechanism. To address these situations, each minimum measure in § 122.34(b) that would require the small MS4 operator to develop an ordinance or other regulatory mechanism states that the operator is only required to implement that requirement to "the extent allowable under State, Tribal

or local law." See § 122.34(b)(3)(ii) (illicit discharge elimination), § 122.34(b)(4)(ii) (construction runoff control) and § 122.34(b)(5)(ii) (post-construction storm water management). This regulatory language does not mean that a operator of a small MS4 with ordinance making authority can simply fail to pass an ordinance necessary for a § 122.34(b) program. The reference to "the extent allowable under * * * local law" refers to the local laws of *other* political subdivisions to which the MS4 operator is subject. Rather, a small MS4 operator that seeks to implement a program under section § 122.34(b) may omit a requirement to develop an ordinance or other regulatory mechanism only to the extent its municipal charter, State constitution or other legal authority prevents the operator from exercising the necessary authority. Where the operator cannot obtain the authority to implement any activity that is only required to "the extent allowable under State, Tribal or local law," the operator may satisfy today's rule by administering the remaining § 122.34(b) requirements.

Finally, although today's rule provides operators of small MS4s with an option of applying for a permit under § 122.26(d), States authorized to administer the NPDES program are not required to provide this option. NPDES-authorized States could require all regulated small MS4s to be permitted under the minimum measures management approach in § 122.34 as a matter of State law. Such an approach would be deemed to be equally or more stringent than what is required by today's rule. *See* 40 CFR 123.2(i). The federalism concerns discussed above do not apply to requirements imposed by a State on its political subdivisions.

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D. Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. For

final rules subject to Executive Order 13132, EPA also must submit to OMB a statement from the agency's Federalism Official certifying that EPA has fulfilled the Executive Order's requirements.

EPA has concluded that this final rule may have federalism implications. As discussed above in section IV.C., the rule contains a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, of $100 million or more in any one year. Accordingly, the rule may have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Moreover, the rule will impose substantial direct compliance costs on State or local governments. Accordingly, EPA provides the following FSIS under section 6(b) of Executive Order 13132.

1. Description of the Extent of the Agency's Prior Consultation with State and Local Governments

Although this rule was proposed long before the November 2, 1999 effective date of Executive Order 13132, EPA consulted extensively with affected State and local governments pursuant to the intergovernmental consultation provisions of Executive Order 12875, "Enhancing the Intergovernmental Partnership" (now revoked by Executive Order 13132) and section 204 of UMRA.

First, EPA provided State and local governments the opportunity to comment on draft alternative approaches for the proposed rule through publishing a notice requesting information and public comment in the **Federal**

Register on September 9, 1992 (57 FR 41344). This notice presented a full range of regulatory alternatives. At that time, EPA received more than 130 comments, including approximately 43 percent from municipalities and 24 percent from State or Federal agencies. These comments were the genesis of many of the provisions in the today's rule, including reliance on the NPDES program framework (including general permits), providing State and local governments flexibility in selecting additional sources requiring regulation, and focusing on high priority polluters. These comments helped to focus on pollution prevention, watershed-based concerns and BMPs. They also led to certain exemptions for facilities that do not pollute national waters.

In early 1993, EPA, in conjunction with the Rensselaerville Institute, held public and expert meetings to assist in developing and analyzing options for identifying unregulated storm water sources and possible controls. These meetings provided participants an additional opportunity to provide input into the CWA section 402(p)(6) program development process. The final rule addresses several of the key concerns identified in these groups, including provisions that provide flexibility to the States to select sources to be controlled and types of permits to be issued, and flexibility to MS4s in selecting BMPs.

EPA also conducted outreach with representatives of small entities, including small governments, in conjunction with the convening of a Small Business Advocacy Review Panel under SBREFA which is discussed in section III.F. of the preamble.

In addition, EPA established the Urban Wet Weather Flows Advisory Committee (FACA), which in turn established the Storm Water Phase II Subcommittee. Consistent with the Federal Advisory Committee Act, the membership of the Committee and the Storm Water Phase II Subcommittee was balanced among EPA's various outside stakeholder interests, including representatives from State governments, municipal governments (both elected officials and appointed officials) and Tribal governments, as well as industrial and commercial sectors, agriculture, environmental and public interest groups.

2. Summary of Nature of State and Local Government Concerns, and Statement of the Extent to Which Those Concerns Have Been Met

In general, municipal government representatives supported the NPDES approach in today's rule for the following reasons: it will be uniformly applied on a nationwide basis; it provides flexibility to allow incorporation of State and local programs; it resolves the problem of donut holes that cause water quality impacts in urbanized areas; and it allows co-permitting of small regulated MS4s with those regulated under the existing storm water program.

In contrast, State representatives sought alternative approaches for State implementation of the storm water program for Phase II sources. State representatives asserted that a non-NPDES alternative approach best facilitated watershed management and avoided duplication and overlapping regulations. These representatives pointed out that there are a variety of State programs – not based on the CWA – implementing effective storm water controls, and that EPA should provide incentives for

their implementation and improvement in performance. EPA continues to believe that an NPDES approach is the best approach in order to adequately protect water quality. However, EPA has worked with States on an alternative approach that provides flexibility within the NPDES framework. The final rule allows States with a watershed permitting approach to phase in permit coverage for MS4s in jurisdictions with a population less than 10,000 and provides two waivers from coverage for small MS4s. This issue is discussed in section II.C of the preamble, Program Framework: NPDES Approach.

Some municipal governments objected that the rule's minimum measures for small MS4s violate the Tenth Amendment insofar as they require the operators of MS4s to regulate third parties according to the "minimum measures" for municipal storm water management programs. EPA disagrees that today's rule is inconsistent with Tenth Amendment principles. Permits issued under today's rule will not compel political subdivisions of States to regulate in their sovereign capacities, but rather to effectively control discharges out of their storm sewer systems in their owner/operator capacities. For MS4s that do not accept this "default" minimum measures-based approach (to control discharges out of the storm sewer system by exercising local powers to control discharges into the storm sewer system), today's rule allows for alternative permits through individual permit applications. EPA made revisions to the rule to allow regulated small MS4s to opt out of the minimum measures approach and instead apply for an individual permit. This issue is discussed in section II.H.3.c.iii of the preamble, Alternative Permit Option/Tenth Amendment.

3. Summary of the Agency's Position Supporting the Need To Issue the Regulation

As discussed more fully in section I.B. above, today's rule is needed because uncontrolled storm water discharges from areas of urban development and construction activity have been shown to have negative impacts on receiving waters by changing the physical, biological, and chemical composition of the water, resulting in an unhealthy environment for aquatic organisms, wildlife, and people. As discussed in section II.C., the NPDES approach in today's rule is needed to ensure uniform application on a nationwide basis, to provide flexibility to allow incorporation of State and local programs, to resolve the problem of donut holes that cause water quality impacts in urbanized areas, and to allow co-permitting of small regulated MS4s with those regulated under the existing storm water program.

The draft final rule was transmitted to OMB on July 6, 1999. Because transmittal occurred before the November 2, 1999 effective date of Executive Order 13132, certification under section 8 of the Executive Order is not required.

* * *

§122.30 What are the objectives of the storm water regulations for small MS4s?

(a) Sections 122.30 through 122.37 are written in a "readable regulation" format that includes both rule requirements and EPA guidance that is not legally binding. EPA has clearly distinguished its recommended guidance from the rule requirements by putting the guidance in a separate paragraph headed by the word "guidance".

(b) Under the statutory mandate in section 402(p)(6) of the Clean Water Act, the purpose of this portion of the storm water program is to designate additional sources that need to be regulated to protect water quality and to establish a comprehensive storm water program to regulate these sources. (Because the storm water program is part of the National Pollutant Discharge Elimination System (NPDES) Program, you should also refer to §122.1 which addresses the broader purpose of the NPDES program.)

(c) Storm water runoff continues to harm the nation's waters. Runoff from lands modified by human activities can harm surface water resources in several ways including by changing natural hydrologic patterns and by elevating pollutant concentrations and loadings. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables.

(d) EPA strongly encourages partnerships and the watershed approach as the management framework for efficiently, effectively, and consistently protecting and restoring aquatic ecosystems and protecting public health.

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§122.34 As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?

(a) Your NPDES MS4 permit will require at a minimum that you develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from your MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. Your storm water management program must include the minimum control measures described in paragraph (b) of this section unless you apply for a permit under §122.26(d). For purposes of this section, narrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality. Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to §122.33 constitutes compliance with the standard of reducing pollutants to the "maximum extent practicable." Your NPDES permitting authority will specify a time period of up to 5 years from the date of permit issuance for you to develop and implement your program.

(b) *Minimum control measures* – (1) *Public education and outreach on storm water impacts.* (i) You must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on

water bodies and the steps that the public can take to reduce pollutants in storm water runoff.

(ii) Guidance: You may use storm water educational materials provided by your State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. The public education program should inform individuals and households about the steps they can take to reduce storm water pollution, such as ensuring proper septic system maintenance, ensuring the proper use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes. EPA recommends that the program inform individuals and groups how to become involved in local stream and beach restoration activities as well as activities that are coordinated by youth service and conservation corps or other citizen groups. EPA recommends that the public education program be tailored, using a mix of locally appropriate strategies, to target specific audiences and communities. Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed and beach cleanups. In addition, EPA recommends that some of the materials or outreach programs be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts. For example, providing information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. You are encouraged to tailor your outreach

program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children.

(2) *Public involvement/participation.* (i) You must, at a minimum, comply with State, Tribal and local public notice requirements when implementing a public involvement/ participation program.

(ii) Guidance: EPA recommends that the public be included in developing, implementing, and reviewing your storm water management program and that the public participation process should make efforts to reach out and engage all economic and ethnic groups. Opportunities for members of the public to participate in program development and implementation include serving as citizen representatives on a local storm water management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts. (Citizens should obtain approval where necessary for lawful access to monitoring sites.)

(3) *Illicit discharge detection and elimination.* (i) You must develop, implement and enforce a program to detect and eliminate illicit discharges (as defined at §122.26(b)(2)) into your small MS4.

(ii) You must:

(A) Develop, if not already completed, a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls;

(B) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into your storm sewer system and implement appropriate enforcement procedures and actions;

(C) Develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to your system; and

(D) Inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste.

(iii) You need address the following categories of non-storm water discharges or flows (i.e., illicit discharges) only if you identify them as significant contributors of pollutants to your small MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (discharges or flows from fire fighting activities are excluded from the effective prohibition against non-storm water and need only be addressed where they are identified as significant sources of pollutants to waters of the United States).

(iv) Guidance: EPA recommends that the plan to detect and address illicit discharges include the following four components: procedures for locating priority areas likely to

have illicit discharges; procedures for tracing the source of an illicit discharge; procedures for removing the source of the discharge; and procedures for program evaluation and assessment. EPA recommends visually screening outfalls during dry weather and conducting field tests of selected pollutants as part of the procedures for locating priority areas. Illicit discharge education actions may include storm drain stenciling, a program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials.

(4) *Construction site storm water runoff control.* (i) You must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of storm water discharges from construction activity disturbing less than one acre must be included in your program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. If the NPDES permitting authority waives requirements for storm water discharges associated with small construction activity in accordance with §122.26(b)(15)(i), you are not required to develop, implement, and/or enforce a program to reduce pollutant discharges from such sites.

(ii) Your program must include the development and implementation of, at a minimum:

(A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law;

(B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(D) Procedures for site plan review which incorporate consideration of potential water quality impacts;

(E) Procedures for receipt and consideration of information submitted by the public, and

(F) Procedures for site inspection and enforcement of control measures.

(iii) Guidance: Examples of sanctions to ensure compliance include non-monetary penalties, fines, bonding requirements and/or permit denials for non-compliance. EPA recommends that procedures for site plan review include the review of individual pre-construction site plans to ensure consistency with local sediment and erosion control requirements. Procedures for site inspections and enforcement of control measures could include steps to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and receiving water quality. You are encouraged to provide appropriate educational and training measures for construction site operators. You may wish to require a storm water pollution prevention plan for construction sites within your jurisdiction that discharge into your system. See §122.44(s) (NPDES permitting authorities' option to incorporate

qualifying State, Tribal and local erosion and sediment control programs into NPDES permits for storm water discharges from construction sites). Also see §122.35(b) (The NPDES permitting authority may recognize that another government entity, including the permitting authority, may be responsible for implementing one or more of the minimum measures on your behalf.)

(5) *Post-construction storm water management in new development and redevelopment.*

(i) You must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into your small MS4. Your program must ensure that controls are in place that would prevent or minimize water quality impacts.

(ii) You must:

(A) Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for your community;

(B) Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law; and

(C) Ensure adequate long-term operation and maintenance of BMPs.

(iii) Guidance: If water quality impacts are considered from the beginning stages of a project, new development

and potentially redevelopment provide more opportunities for water quality protection. EPA recommends that the BMPs chosen: be appropriate for the local community; minimize water quality impacts; and attempt to maintain pre-development runoff conditions. In choosing appropriate BMPs, EPA encourages you to participate in locally-based watershed planning efforts which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, EPA recommends that you adopt a planning process that identifies the municipality's program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures. In developing your program, you should consider assessing existing ordinances, policies, programs and studies that address storm water runoff quality. In addition to assessing these existing documents and programs, you should provide opportunities to the public to participate in the development of the program. Non-structural BMPs are preventative actions that involve management and source controls such as: policies and ordinances that provide requirements and standards to direct growth to identified areas, protect sensitive areas such as wetlands and riparian areas, maintain and/or increase open space (including a dedicated funding source for open space acquisition), provide buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; policies or ordinances that encourage infill development in higher density urban areas, and areas with existing infrastructure; education programs for developers

and the public about project designs that minimize water quality impacts; and measures such as minimization of percent impervious area after development and minimization of directly connected impervious areas. Structural BMPs include: storage practices such as wet ponds and extended-detention outlet structures; filtration practices such as grassed swales, sand filters and filter strips; and infiltration practices such as infiltration basins and infiltration trenches. EPA recommends that you ensure the appropriate implementation of the structural BMPs by considering some or all of the following: pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with design, construction or operation and maintenance. Storm water technologies are constantly being improved, and EPA recommends that your requirements be responsive to these changes, developments or improvements in control technologies.

(6) *Pollution prevention/good housekeeping for municipal operations.* (i) You must develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations. Using training materials that are available from EPA, your State, Tribe, or other organizations, your program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

(ii) Guidance: EPA recommends that, at a minimum, you consider the following in developing your program: maintenance activities, maintenance schedules, and long-term inspection procedures for structural and non-structural storm water controls to reduce floatables and other pollutants discharged from your separate storm sewers; controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations and snow disposal areas operated by you, and waste transfer stations; procedures for properly disposing of waste removed from the separate storm sewers and areas listed above (such as dredge spoil, accumulated sediments, floatables, and other debris); and ways to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices. Operation and maintenance should be an integral component of all storm water management programs. This measure is intended to improve the efficiency of these programs and require new programs where necessary. Properly developed and implemented operation and maintenance programs reduce the risk of water quality problems.

(c) If an existing qualifying local program requires you to implement one or more of the minimum control measures of paragraph (b) of this section, the NPDES permitting authority may include conditions in your NPDES permit that direct you to follow that qualifying program's requirements rather than the requirements of paragraph (b) of this section. A qualifying local program is a local, State or Tribal municipal storm water management program

that imposes, at a minimum, the relevant requirements of paragraph (b) of this section.

(d)(1) In your permit application (either a notice of intent for coverage under a general permit or an individual permit application), you must identify and submit to your NPDES permitting authority the following information:

(i) The best management practices (BMPs) that you or another entity will implement for each of the storm water minimum control measures at paragraphs (b)(1) through (b)(6) of this section;

(ii) The measurable goals for each of the BMPs including, as appropriate, the months and years in which you will undertake required actions, including interim milestones and the frequency of the action; and

(iii) The person or persons responsible for implementing or coordinating your storm water management program.

(2) If you obtain coverage under a general permit, you are not required to meet any measurable goal(s) identified in your notice of intent in order to demonstrate compliance with the minimum control measures in paragraphs (b)(3) through (b)(6) of this section unless, prior to submitting your NOI, EPA or your State or Tribe has provided or issued a menu of BMPs that addresses each such minimum measure. Even if no regulatory authority issues the menu of BMPs, however, you still must comply with other requirements of the general permit, including good faith implementation of BMPs designed to comply with the minimum measures.

(3) Guidance: Either EPA or your State or Tribal permitting authority will provide a menu of BMPs. You may

choose BMPs from the menu or select others that satisfy the minimum control measures.

(e)(1) You must comply with any more stringent effluent limitations in your permit, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis. The permitting authority may include such more stringent limitations based on a TMDL or equivalent analysis that determines such limitations are needed to protect water quality.

(2) Guidance: EPA strongly recommends that until the evaluation of the storm water program in §122.37, no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4, except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measures to protect water quality.

(f) You must comply with other applicable NPDES permit requirements, standards and conditions established in the individual or general permit, developed consistent with the provisions of §§122.41 through 122.49, as appropriate.

(g) Evaluation and assessment – (1) Evaluation. You must evaluate program compliance, the appropriateness of your identified best management practices, and progress towards achieving your identified measurable goals.

Note to Paragraph (g)(1): The NPDES permitting authority may determine monitoring requirements for you in accordance with State/Tribal monitoring plans appropriate to your watershed. Participation in a group monitoring program is encouraged.

(2) Recordkeeping. You must keep records required by the NPDES permit for at least 3 years. You must submit your records to the NPDES permitting authority only when specifically asked to do so. You must make your records, including a description of your storm water management program, available to the public at reasonable times during regular business hours (see §122.7 for confidentiality provision). (You may assess a reasonable charge for copying. You may require a member of the public to provide advance notice.)

(3) Reporting. Unless you are relying on another entity to satisfy your NPDES permit obligations under §122.35(a), you must submit annual reports to the NPDES permitting authority for your first permit term. For subsequent permit terms, you must submit reports in year two and four unless the NPDES permitting authority requires more frequent reports. Your report must include:

(i) The status of compliance with permit conditions, an assessment of the appropriateness of your identified best management practices and progress towards achieving your identified measurable goals for each of the minimum control measures;

(ii) Results of information collected and analyzed, including monitoring data, if any, during the reporting period;

(iii) A summary of the storm water activities you plan to undertake during the next reporting cycle;

(iv) A change in any identified best management practices or measurable goals for any of the minimum control measures; and

(v) Notice that you are relying on another governmental entity to satisfy some of your permit obligations (if applicable).

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§122.36 As an operator of a regulated small MS4, what happens if I don't comply with the application or permit requirements in §§122.33 through 122.35?

NPDES permits are federally enforceable. Violators may be subject to the enforcement actions and penalties described in Clean Water Act sections 309 (b), (c), and (g) and 505, or under applicable State, Tribal, or local law. Compliance with a permit issued pursuant to section 402 of the Clean Water Act is deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for toxic pollutants injurious to human health. If you are covered as a co-permittee under an individual permit or under a general permit by means of a joint Notice of Intent you remain subject to the enforcement actions and penalties for the failure to comply with the terms of the permit in your jurisdiction except as set forth in §122.35(b).

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(2)

Supreme Court, U.S.
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No. 03-1125

In the Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency's Phase II Stormwater Rule, 64 Fed. Reg. 68,722 (1999), violates the Tenth Amendment by coercing local governmental entities to either enforce a federal program or surrender their police powers.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-92) is reported at 344 F.3d 832.

JURISDICTION

The initial decision of the court of appeals was entered on January 14, 2003. The court denied all petitions for rehearing, but vacated its opinion, and entered its final decision and judgment, on September 15, 2003. The petition for a writ of certiorari was filed on December 15, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Environmental Protection Agency (EPA) issued its Phase II Stormwater Rule, 64 Fed. Reg. 68,722 (1999), pursuant to the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, to control pollutants discharged to waters of the United States by municipal separate storm sewer systems serving fewer than 100,000 people (small MS4s). Petitioner and other parties challenged various aspects of the rule. The court of appeals rejected most of those challenges, Pet. App. 1-92, including petitioner's contention that the rule violates the Tenth Amendment, *id.* at 14-22.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," except in compliance with the Act. 33 U.S.C. 1311(a). Section 402 authorizes EPA (or a State with a program approved by EPA) to issue permits for the discharge of pollutants under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. Congress amended the CWA in 1987 to better regulate stormwater discharges from point sources. See Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 69. It added new Section 402(p), 33 U.S.C. 1342(p), which establishes two separate phases for the regulation of MS4 stormwater discharges.[1]

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[1] MS4s are subject to CWA regulation if they collect stormwater runoff and convey it to waters of the United States. The MS4 may contain pollutants picked up by runoff before it enters the MS4 (*e.g.*, fertilizers from lawns, oil from roads) or pollutants introduced directly into the MS4 (*e.g.*, wastes dumped into storm sewers). The MS4 outfall (*i.e.* the pipe(s) or other conveyance(s) through which stormwaters exit the MS 4 and enter the waters of the United States) constitutes the "point source" from which there is a "discharge of pollutants" to "navigable waters." See § 502(6), (12) and (14), 33 U.S.C. 1362(6), (12) and (14).

First, subsections (p)(2) through (4) require EPA to establish a permit program for certain dischargers, including large and medium MS4s (*i.e.*, those serving populations greater than 100,000), according to a prescribed schedule. Section 402(p)(3)(B)(iii) provides that "[p]ermits for discharges from municipal storm sewers * * * shall require controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. 1342(p)(3)(B)(iii). Pursuant to those provisions, EPA issued the Phase I stormwater rule in 1990. Second, subsections (p)(5) and (6) require EPA to investigate other stormwater discharges and to create a "comprehensive program to regulate" them. See 33 U.S.C. 1342(p)(5) and (6). The Phase II stormwater rule addresses those sources, including small MS4s.

2. The Phase II rule requires small MS4s to implement a stormwater management program to reduce discharges of pollutants from the MS4 to the "maximum extent practicable" (MEP). To implement that requirement, the rule gives small MS4 operators three options for NPDES permitting. 40 C.F.R. 122.33(a). An operator may either submit a notice of intent (NOI) to comply with a general permit, apply for an individual permit, or apply to be regulated under a revised or re-issued individual permit covering a nearby large or medium MS4. 40 C.F.R. 122.33(b).[2]

a. Small MS4s seeking authorization under a general NPDES permit must submit an NOI, which describes "best management practices" (BMPs) through which the MS4 or others will implement six minimum control measures (the Minimum Measures). 40 C.F.R. 122.33(b)(1), 122.34(d)(1). The Minimum Measures set out a discharge management program consisting of: (1) public education; (2) public

[2] MS4s can also avoid regulation under the CWA if, for example, they have the ability to direct stormwater discharges to detention ponds that do not discharge to waters of the United States.

participation in program development and implementation; (3) detection and elimination of "illicit," or non-stormwater discharges to the MS4; (4) reduction of pollutants in stormwater runoff to the MS4 from construction activities disturbing one acre or more; (5) control of stormwater runoff from new development and redevelopment projects disturbing one acre or more; and (6) pollution prevention and good housekeeping for municipal operations. 40 C.F.R. 122.34(b)(1)-(6).

b. Alternatively, small MS4 operators may choose to apply for individual NPDES permits (alternative permits). 40 C.F.R. 122.33(b)(2)(ii), 122.34(a). The alternative permit option allows a small MS4 to dispense with some or all of the Minimum Measures and, instead, obtain a custom-designed individual permit based on an abbreviated form of the Phase I MS4 permit application requirements of 40 C.F.R. 122.26(d). In applying for an individual permit, a small MS4 must describe its current stormwater management program, as well as certain components of the program proposed as a basis for permit authorization, but need not provide information concerning its authority to regulate discharges to the MS4. 40 C.F.R. 122.33(b)(2)(ii) (cross referencing permit application regulations for large and medium MS4s at 40 C.F.R. 122.26(d)(1) and (2)). Neither the Phase II alternative permit provisions nor the Phase I permit application provisions they incorporate specify what the permit ultimately issued must contain, except that an alternative permit must require a stormwater management program "designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. 122.34(a).

c. Under the third alternative, small MS4s can apply to be regulated under a revised or re-issued individual NPDES permit covering a nearby large or medium MS4, with provisions adapted and applicable to the small MS4. 40 C.F.R. 122.33(b)(2)(ii). That option, too, affords small MS4s an opportunity to avoid implementing the Minimum Measures that would otherwise apply under a general NPDES permit.

In providing those three alternatives, EPA recognized that it would generally be less expensive for MS4s to implement management practices to limit the introduction of pollutants into their stormwater collection systems than to remove pollutants from their discharges. In implementing management practices, the Phase II rule gives MS4s a choice between utilizing specified minimum control measures or designing another approach to reduce discharges of pollutants to the maximum extent practicable.

3. Various entities brought judicial challenges to the Phase II rule. The court of appeals rejected virtually all of those challenges, remanding the rule on four matters not at issue here. See Pet. App. 4-5. The court specifically rejected petitioner's contention that the Phase II rule violates the Tenth Amendment. Pet. App. 14-22.

The court of appeals recognized that, "[u]nder the Tenth Amendment, 'the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs.'" Pet. App. 19 (quoting *Printz* v. *United States*, 521 U.S. 898, 925 (1997)). Consequently, the federal government may not coerce States or municipalities to regulate third parties to implement a federal program. *Ibid.* (citing *Reno* v. *Condon*, 528 U.S. 141, 151 (2000), and *Printz*, 521 U.S. at 931 n.15)). However, the federal government may encourage States and municipalities to choose to utilize their legislative

authorities to implement a federal program. *Ibid.* (citing *New York* v. *United States*, 505 U.S. 144, 166-168 (1992)).

Applying those principles to this case, the court of appeals ruled that the Phase II rule gives each MS4 a choice: either seek a general permit that requires the MS4 to adopt the Minimum Measures, or seek an individual permit, the terms of which are not prescribed by the rule, but which offers MS4s flexibility in proposing the controls to reduce pollutants to the maximum extent practicable. Pet. App. 20.[3] For example, an individual permit might simply require an MS4 to satisfy specific effluent limitations rather than implement management programs or regulate third parties. *Id.* at 20-21 (citing *City of Abilene* v. *EPA*, 325 F.3d 657, 661-663 (5th Cir. 2003)). The availability of the individual permit option avoids any unconstitutional coercion of MS4s, even if the Minimum Measures option requires MS4s to regulate third parties. *Id.* at 21-22.

The court also ruled that, because the Phase II rule does not coerce States to exercise their legislative powers, the rule does not alter the federal-state framework. Consequently, Congress was not required to provide a clear statement of its intent to authorize EPA to offer MS4s the choice of implementing Minimum Measures. Pet. App. 16 n.18.

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[3] The court remanded portions of the general permitting program of the Phase II rule to the extent that the rule allows regulated entities to establish their own plans to reduce discharges to the maximum extent practicable without requiring that those plans be the subject of review by a permitting authority, or public notice and comment. Pet. App. 29-41. EPA presently is addressing the remand. EPA's actions on remand will not affect the constitutional issues presented in the petition.

ARGUMENT

The court of appeals correctly rejected petitioner's Tenth Amendment challenge to EPA's Phase II Stormwater Rule. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner's Tenth Amendment challenge to EPA's Phase II rule rests on petitioner's construction of the regulatory provisions establishing the alternative permit program. Pet. App. 20. Specifically, petitioner contends that 40 C.F.R. 122.26(d) requires small MS4s to regulate third parties in order to obtain an individual permit. Pet. 14, 27-29. Petitioner's construction is incorrect and has been rejected by the two courts of appeals that have addressed the issue. *Id.* at 14-22; *City of Abilene* v. *EPA*, 325 F.3d 657 (5th Cir. 2003).

Petitioner's interpretation is flawed because it is inconsistent with the regulation's unambiguous language. EPA promulgated Section 122.26(d) as part of the Phase I stormwater rule applicable to medium and large MS4s. The Phase II rule provides that any small MS4 operator also may apply for an individual permit by submitting a permit application that complies with Section 122.26(d). 40 C.F.R. 122.33(b)(2)(ii), 122.34(a). Nothing in those regulations requires that a MS4 operator undertake to regulate the activities of third parties in order to obtain an individual permit. Indeed, the regulations expressly allow MS4 operators, when applying for individual permits, to decide not to control third-party discharges into MS4s.[4] Conse-

[4] "You do not need to submit the information required by §§ 122.26(d)(1)(ii) and (2) regarding your legal authority [to control discharges to the MS4], unless you intend for the permit writer to take such information into account when developing your other permit conditions." 40 C.F.R. 122.33(b)(2)(ii).

quently, and notwithstanding petitioner's unsubstantiated allegation to the contrary (Pet. 27-28), a permit application that does not contain information regarding controls on third parties would not be denied on the grounds that a MS4 operator has elected not to use its authority to regulate third persons.

2. The Phase II rule does not violate the Tenth Amendment because it allows MS4s to achieve applicable pollution limits by choosing an alternative–individual permits–that does not subject the local government to any conceivably unconstitutional burden. As the court of appeals correctly recognized, EPA's provision of that alternative ensures that the other alternative–general permits with Minimum Measures–does not contravene the Tenth Amendment.[5]

Petitioner does not dispute that the CWA authorizes EPA to limit an MS4's discharges of pollutants. Pet. 2. Those discharge limitations are restrictions of general applicability and are thus constitutional under *Reno* v. *Condon*, 528 U.S. at 150. As discussed above, the individual permit option is a constitutional means of regulating such discharges.

The Phase II rule is not rendered unconstitutional by offering MS4 operators the additional option of complying with a general permit that includes the Minimum Measures. By offering that choice, the Phase II rule observes the principle that "[t]he Federal Government may not compel the States to enact or administer federal regulatory

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"Your storm water management program must include the minimum control measures * * * *unless* you apply for a permit under § 122.26(d)." 40 C.F.R. 122.34(a) (emphasis added).

[5] Because the individual permit option does not compel MS4 operators to exercise their police powers, there is no reason to resolve the further question whether the Minimum Measures actually do compel such exercise.

programs," *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 925-926, but the federal government may offer the States the option of voluntarily participating in implementing those programs, *id.* at 936 (O'Connor, J., concurring). See *New York*, 505 U.S. at 167 ("we have recognized Congress' power to offer States the choice of regulating"); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("We fail to see why the * * * Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

As the court of appeals recognized, the federal government may create inducements for States to participate in the implementation of federal programs, so long as the inducements are not coercive. See Pet. App. 19. This Court has "identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests." *New York*, 505 U.S. at 166. Federal encouragement is permissible if "the residents of the State retain the ultimate decision as to whether or not the State will comply." *Id.* at 168.

Under the Phase II rule, each MS4 operator retains the ultimate decision as to whether it will exercise its legislative authority to control pollutants entering the MS4 or take other measures to reduce discharges of pollutants by the MS4 to waters of the United States. For example, MS4s that conclude that it is contrary to local interests to implement the challenged Minimum Measures may decline to do so and elect to apply for an individual permit. That power to choose ensures that MS4 operators are not commandeered or coerced into enacting and enforcing a federal regulatory program.

Petitioner contends that MS4 operators cannot make an informed choice because, according to petitioner, EPA has not fully informed MS4s of the terms of the individual

permit option. Pet. 24-26. Petitioner has not previously made that argument, and the argument should therefore be treated as waived. In any event, the predicate for the argument is mistaken.

MS4s have various means of acquiring the information necessary to make an informed decision about which stormwater permitting option best suits them. Permitting authority staff members are typically available to discuss the range of options available under both individual and general permits. In addition, EPA regulations provide that an MS4 be given information necessary to determine whether the proposed terms of an individual permit would be acceptably tailored to that MS4's circumstances.[6] For example, after receipt of an individual permit application, the permitting authority issues a draft permit. 40 C.F.R. 124.6. The MS4 can comment on the terms of the proposed permit and otherwise continue to pursue an individual permit. At any juncture in that process, the MS4, knowing the likely terms of an individual permit, can decide that pursuing an individual permit is not the most advantageous option, and can elect to pursue coverage under a general permit.

As the Fifth Circuit's decision in *City of Abilene*, *supra*, illustrates, the NPDES permitting process provides MS4s with sufficient information to make an informed choice. In that case, two cities participated in the application process under 40 C.F.R. 122.26(d)—the process applicable to the

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[6] Each Phase II permitting authority "must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124, and 125" of Title 40. 40 C.F.R. 123.35(a). The Phase II Rule simply supplements those requirements. 40 C.F.R. 123.35(a); 64 Fed. Reg. at 68,744.

alternative permit program. 325 F.3d at 660.[7] Under the negotiated permitting process, EPA offered the cities two options: they could obtain permits with conditions that required the cities to develop, implement, and enforce programs to prevent the discharge of pollutants into their MS4s from a variety of sources, or they could pursue numeric end-of-pipe permits that would have required the cities to satisfy specific effluent limitations rather than implement management programs. *Ibid.* The court rejected the cities' Tenth Amendment challenge, ruling that the cities were not compelled to implement a federal regulatory scheme because they voluntarily chose the management permits over the permits imposing end-of-pipe effluent limitations. *Id.* at 663.

3. Petitioner mistakenly argues (Pet. 16) that, under the Tenth Amendment, only Congress, and not an executive branch agency, may offer States a choice of regulating third parties or being regulated themselves. The Tenth Amendment preserves certain powers of the States against federal encroachment; it does not distinguish between intrusion by the legislative branch as opposed to the executive branch. Cf. *Printz*, 521 U.S. at 935 ("The *Federal Government* may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce federal regulatory programs.") (emphasis added). Because the Phase II Stormwater Rule provides MS4s with choices that eliminate any prospect of a Tenth Amendment violation, petitioner's argument, at most, raises only the question of whether the CWA authorizes EPA to offer MS4 operators the opportunity to

[7] The process was applicable in that case because the cities operated medium MS4s, for which EPA and authorized States issue only individual NPDES permits.

protect water quality by regulating discharges of pollutants into their MS4s.

Petitioner incorrectly contends (Pet. 16-20) that the Phase II rule is invalid because there is no "clear indication" of congressional intent to allow EPA to offer the choices set out in the rule. Congress delegated EPA broad authority to offer that choice. See, *e.g.*, 33 U.S.C. 1342(p)(6) (directing EPA to develop a regulatory program that meets specified minimum requirements and "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate"). EPA responded by allowing MS4 operators to decide for themselves whether to exercise their legislative and executive powers to implement "controls" to reduce the pollutants entering the stormwater. The plain statement rule has no application here, because that approach does not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

Contrary to petitioner's contentions (Pet. 16-17), the court of appeals did not err in deferring to EPA's interpretation of the CWA under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 16 n.18. This Court has indicated that *Chevron* deference is not appropriate where "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). But that is not the case here. The Phase II rule does not commandeer the sovereign powers of MS4 operators, but instead allows them to reduce pollutants in their stormwater discharges either by electing to control pollutants coming into MS4s or by

removing pollutants before discharging to waters of the United States.

Petitioner suggests, for the first time, that the Phase II rule is inconsistent with 33 U.S.C. 1251(b).[8] Pet. 19-20. Even if that argument had been timely raised, it would be wrong. Congress granted EPA broad authority to "prescribe such regulations as are necessary to carry out [the Administrator's] functions under this chapter," 33 U.S.C. 1361(a), and it specifically directed EPA to "establish a comprehensive program to regulate" the kinds of stormwater discharges at issue here. 33 U.S.C. 1342(p)(6). The only relevant constraints are that the regulations, "at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines." 33 U.S.C. 1342(p)(6). EPA's decision to give MS4 operators the option of exercising their regulatory authorities to reduce stormwater-based pollution does not run afoul of Section 1251(b). Rather, EPA's provision of that option distinguishes MS4s from other entities subject to regulation and actually preserves the "primary responsibilities and rights" of political subdivisions of the States "to prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b).

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[8] Section 1251(b) provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. 1251(b).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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In the

Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT NATURAL RESOURCES DEFENSE COUNCIL, INC.

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QUESTIONS PRESENTED

The Environmental Protection Agency (EPA) promulgated the Phase II stormwater rule to regulate pollutant discharges from certain small municipal separate storm sewer systems (MS4s). The rule gives the MS4 operator a choice between two compliance options. Under one option, the MS4 has the freedom to design its own pollution reduction program by selecting control activities within six broad categories, but must enact certain ordinances or other regulatory mechanisms. Under the alternative, the MS4 may obtain an individual permit that does not require the MS4 operator to regulate third parties. In the past, EPA has offered such alternative permits to MS4s under the authority of the same regulations that now serve as the basis for the alternative compliance option under the Phase II rule.

The questions presented are:

1. Whether the court of appeals correctly found that the Phase II rule does not violate the Tenth Amendment because the rule does in fact provide MS4s with a compliance alternative that does not require regulation of third parties.

2. Whether the court of appeals correctly held that the canon of construction requiring a clear statement of congressional intent when statutory interpretations raise significant federalism questions does not invalidate the Phase II rule, because the canon does not apply when there is no serious constitutional issue, and EPA's inclusion of the alternative permit option removes any doubt as to whether the rule violates the Tenth Amendment.

LIST OF PARTIES

Petitioner is the Texas Cities Coalition on Stormwater (Texas Cities). The Texas Counties Storm Water Coalition (Texas Counties) also filed a petition for review of the Phase II rule and filed joint briefs with the Texas Cities in the court of appeals. For the purpose of the proceedings before this Court, the Texas Counties wish to remain a party and have adopted the position of the Texas Cities, but will not file separate papers. Respondents are EPA and the respondent-intervenor in the court of appeals, the Natural Resources Defense Council, Inc. (NRDC).

The Environmental Defense Center, the American Forest & Paper Association and the National Association of Home Builders filed petitions for review of the Phase II rule on issues different from those presented in this petition for writ of certiorari. Those three entities did not intervene in the Texas Cities' petition for review and are therefore not parties to these proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, NRDC states that it is a New York nonprofit corporation that has no parent corporation. It further states that no publicly held company owns any of its stock.

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In the

Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NRDC respectfully requests that the Court deny the petition for a writ of certiorari to review the September 15, 2003, judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The final opinion below is *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). App. 1-92.[1] In issuing the final opinion, the Ninth Circuit vacated its initial opinion, re-

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[1] Citations to "App." refer to the Appendix to the Texas Cities' petition for writ of certiorari.

ported as *Environmental Defense Center* v. *EPA*, 319 F.3d 398 (9th Cir. 2003).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant provision of the Clean Water Act (CWA), section 402(p), 33 U.S.C. § 1342(p), is reproduced at App. 93-97. The Phase II rule and its preamble were published at 64 Fed. Reg. 68722-68852. App. 98-166 (excerpts). The rule itself is codified at various sections of 40 C.F.R. parts 9, 122, 123 and 124. *See* App. 167-81 (setting forth certain provisions of the rule, including 40 C.F.R. §§ 122.30, 122.34 and 122.36); NRDC App. 11-12 (setting forth excerpts from 40 C.F.R. § 122.33(b)(2)(ii))[2]. Certain relevant provisions of EPA's Phase I stormwater rule are incorporated by reference in the Phase II rule. *See* NRDC App. 1-11 (setting forth excerpts from 40 C.F.R. § 122.26(d)).

STATEMENT OF THE CASE

A. Stormwater Pollution and the Stormwater Provision of the Clean Water Act – Section 402(p)

Urban stormwater discharges are a leading cause of water pollution. Uncontrolled discharges of polluted stormwater

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[2] Citations to "NRDC App." refer to the Appendix to this brief.

from MS4s convey metals, pathogens, toxins, sediment, nutrients, trash and other pollutants to the waters of the United States. *National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule*, 64 Fed. Reg. 68722, 68744 (Dec. 8, 1999) (hereinafter Phase II Pream. & R.).

The cornerstone of the nation's water pollution control efforts is the National Pollutant Discharge Elimination System (NPDES) established under section 402 of the Clean Water Act, 33 U.S.C. § 1342. Under the NPDES regime, it is unlawful to discharge pollutants to the waters of the United States from a point source[3] without authorization to do so pursuant to a permit that sets conditions on the discharges.

Since the enactment of the Clean Water Act in 1972, most NPDES permits have relied on numeric effluent limits as the conditions that must be met to render the discharges lawful. Numeric effluent limits are quantitative "end of pipe" restrictions on the amounts or concentrations of pollutants that may be discharged.

In 1977, the District of Columbia Circuit held that storm sewers were point sources that EPA could not exempt from NPDES permitting requirements. *NRDC* v. *Costle*, 568 F.2d 1369, 1377, 1379 (D.C. Cir. 1977). EPA subsequently attempted to promulgate stormwater regulations in the 1970s and 1980s.

In 1987, Congress enacted section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), App. 93-97. Among other things, that statute created a two-phase regulatory program for

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[3] The Clean Water Act defines a point source as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

stormwater discharges. Section 402(p)(4) required that EPA establish regulations setting forth permit application requirements for stormwater discharges from large and medium MS4s, that is, MS4s serving populations of 100,000 persons or greater. 33 U.S.C. § 1342(p)(4), App. 95-96. Section 402(p)(6), in turn, required EPA to designate additional sources of stormwater pollution for regulation and to establish a comprehensive pollution control program for the designated sources. 33 U.S.C. § 1342(p)(6), App. 97.

B. The Phase I Rule

In 1990, EPA promulgated regulations under section 402(p)(4) for large and medium MS4s. Those regulations became known as the Phase I rule.[4] Consistent with the statute, the Phase I rule sets out permit application requirements for those MS4s. 40 C.F.R. § 122.26(d). Among the information that the Phase I rule requires in those permit applications is description of "a program . . . to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the [MS4]." 40 C.F.R. § 122.26(d)(2)(iv)(B)(*1*), NRDC App. 7. However, the rule also provides that the permitting authority can excuse an MS4 from certain of the application requirements, including the requirement that the MS4 describe its program to implement and enforce an illicit discharge ordinance, if the requirement is not "practicable" or "applicable." 40 C.F.R. § 122.26(d)(2)(viii), NRDC App. 10.

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[4] *National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges*, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at various sections of 40 C.F.R. pts. 122-124).

C. The Fifth Circuit's Decision in *City of Abilene*

Since promulgation of the Phase I rule, EPA and other permitting authorities have issued Phase I permits to large and medium MS4s. In *City of Abilene* v. *EPA*, 325 F.3d 657 (5th Cir. 2003), *reh'g en banc denied*, 71 Fed. Appx. 443 (5th Cir. 2003), a unanimous panel of the Fifth Circuit upheld EPA-issued Phase I MS4 permits against two as-applied challenges. The first challenge was based on the canon of construction requiring a clear statement of congressional intent when a statutory interpretation raises serious federalism questions, as set out in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter *SWANCC*). The second challenge was based on the Tenth Amendment.

In *City of Abilene*, EPA had offered the plaintiffs, two Texas cities, a choice between (1) permits that would have required the cities to implement and enforce ordinances or other programs to prevent the discharge of pollutants into their MS4s, and (2) permits containing numeric effluent limits. *Id.* at 660. The cities chose permits of the first type rather than numeric effluent limit permits. Upon issuance of the permits, the cities sought administrative and judicial review. The cities contended that the Clean Water Act did not provide sufficiently clear authority to allow EPA to require an MS4 operator to regulate third parties, and that such regulation of third parties "invoke[d] the outer limits of [federal] power," so that the permits violated the *SWANCC* clear statement canon of construction. *Id.*

In denying that challenge, the Fifth Circuit quoted section 402(p)(3) of the Clean Water Act, 33 U.S.C. § 1342(p)(3), which requires that MS4 permits include "a requirement to effectively prohibit non-stormwater discharges into the storm sewers" and "controls to reduce the discharge of pollutants to the maximum extent practicable, including management prac-

tices, control techniques and system, design and engineering methods, and *such other provisions as the Administrator or the State [permitting authority] determines appropriate for the control of such pollutants.*" *Id.* at 660-61 (emphasis in original). Based on this statutory language, the Fifth Circuit concluded that "even if *Chevron* deference is not warranted, the challenged permit conditions are within EPA's discretion." *Id.* at 661 (referencing *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984)).

The Fifth Circuit also rejected the argument that the permits violated the Tenth Amendment because they required the cities to regulate third parties. *Id.* at 661-63. Following *New York* v. *United States*, 505 U.S. 144 (1992), the court stated that the federal government could encourage states and municipalities to implement a federal regulatory program so long as the choice to do so or not remained with the state or municipal government. *City of Abilene*, 325 F.3d at 662. As a result, the cities could not "establish a Tenth Amendment violation without demonstrating that they had no other option but to regulate [third parties] according to federal standards." *Id.* The Fifth Circuit concluded that EPA's offer of a numeric effluent limit permit gave the cities that other option:

> Like [the statute at issue in *Reno* v. *Condon*, 528 U.S. 141 (2000)], the proposed numeric end-of-pipe permits would not have required the Cities to regulate their own residents but instead, by requiring the Cities to meet effluent limitations, would have regulated them in the same manner as other dischargers of pollutants. Because the record shows that the Cities voluntarily chose the management permits over permits that did not require the Cities to regulate according to federal standards, the Cities have not been compelled to implement a federal regulatory scheme. Accordingly, their Tenth Amendment challenge fails.

Id. at 663.

D. The Phase II Rule

In 1999, EPA promulgated regulations under Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6). Phase II Pream. & R., 64 Fed. Reg. 68722-852. Those regulations became known as the Phase II rule. Consistent with the statute, the Phase II rule designated certain stormwater dischargers for regulation – including certain small MS4s – and established a comprehensive permitting program to regulate them. The preamble to the rule listed approximately 5,700 cities or counties in "urbanized areas" that would be actually or potentially subject to the rule. Phase II Pream. & R., 64 Fed. Reg. at 68812-37. Certain federal facilities are also regulated under the Phase II rule's MS4 provisions. *Id.* at 68749.

The Phase II rule provides two compliance options. One option gives MS4 operators the freedom to design their own regulatory program by selecting pollution control activities from six broad categories referred to as the minimum measures.[5] App. 108 ("each permittee will determine appropriate [management practices] to satisfy each of the six minimum control measures"). EPA designed the rule in this way to provide "maximum flexibility in MS4 permitting" because "MS4s need . . . flexibility to optimize reductions in storm water pollutants on a location-by-location basis." App. 107. The six minimum measure categories are: (1) public education and outreach on stormwater impacts; (2) public involvement/participation; (3) illicit discharge detection and elimina-

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[5] In ruling on a separate petition for review of the Phase II rule, the Ninth Circuit held that the MS4 operators' choice of pollution control measures must be reviewed by the permitting authority to ensure that the MS4 pollution control programs meet relevant statutory standards. App. 37-38. That issue is not before this Court.

tion; (4) construction site stormwater runoff control; (5) post-construction stormwater management in new development and redevelopment; and (6) pollution prevention/good housekeeping for municipal operations. App. 109-42.

Though the minimum measures approach provides flexibility, the MS4's minimum measure pollution control program must include certain features. For the illicit discharge, construction site, and new development and redevelopment minimum measures, the pollution control program must include certain ordinances or other regulatory mechanisms. 40 C.F.R. §§ 122.34(b)(3)(ii)(B), 122.34(b)(4)(ii)(A) & 122.34(b)(5)(ii)(B), App. 171, 172 & 174.

The alternative to the minimum measures approach under the Phase II rule allows regulated small MS4s to obtain individual permits under the Phase I rule's permit application requirements for large and medium MS4s. App. 152-53. EPA stated that those individual Phase II permits would "more specifically focus[ ] on the pollutants" discharged from the regulated MS4s, App. 157, and expressly noted that the permits could be based on numeric effluent limits. App. 158; *see also* App. 158-59 (explaining how appropriate effluent limits might be determined). EPA indicated that MS4 operators seeking permission to discharge under the alternative permit option did not need to submit details about future stormwater program requirements unless the MS4 operator intended that those future program components be considered when developing the permit conditions. App. 159; *see also* 40 C.F.R. § 122.33(b)(2)(ii), NRDC App. 11-12.

EPA added the alternative compliance option in response to comments suggesting that the minimum measures approach might violate the Tenth Amendment by requiring the operators of MS4s to regulate third parties. App. 153-54. EPA explained that the minimum measures approach, standing

alone, did not excessively interfere with the functioning of municipal governments, and therefore did not violate the Tenth Amendment. App. 155-57. EPA further noted that, in any event, providing the alternative permit option resolved any Tenth Amendment concerns:

> Even if the minimum measures approach was constitutionally suspect, a requirement that standing alone would violate constitutional principles of federalism does not raise concerns if the entity subject to the requirement may opt for an alternative action that does not raise a federalism issue.

App. 157.

E. The Court of Appeals' Decision in This Case

In its September 15, 2003 revised opinion, a unanimous panel of the Ninth Circuit rejected the Texas Cities' clear statement and Tenth Amendment challenges to the rule.[6] App. 14-22.

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[6] The court of appeals issued its original opinion, in which the entire panel rejected the clear statement challenge and a majority of the panel rejected the Tenth Amendment challenge, on January 14, 2003. *Environmental Defense Center* v. *EPA*, 319 F.3d 398 (9th Cir. 2003). Judge Richard C. Tallman dissented on the Tenth Amendment point, and on certain other points not relevant to this petition for writ of certiorari. The Texas Cities and Texas Counties filed a petition for panel and en banc rehearing on the clear statement and Tenth Amendment issues. On September 15, 2003, the court of appeals denied the Texas Cities' and Texas Counties' petition for panel and en banc rehearing, but issued a revised opinion. While continuing to uphold the rule against the clear statement and Tenth Amendment challenges, the court amended its opinion on those two points in the wake of the Fifth Circuit's *City of Abilene* decision, which had been issued after the Ninth Circuit's original decision in this action. Judge Tallman joined in the revised opinion on the Tenth Amendment point, making the revised opinion unanimous on both the

On the clear statement issue, as set out in more detail in section II.A below, the court of appeals ruled that EPA's statutory interpretations passed muster under the test for administrative deference set out in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984) as well as under *SWANCC*.

As for the constitutional issue, the Ninth Circuit, like the Fifth Circuit in *City of Abilene*, held that there is no Tenth Amendment violation when EPA offers MS4s at least one compliance alternative that does not require the state or municipality to regulate third parties. App. 19 (citing *New York* v. *United States*, 505 U.S. 144, 168 (1992)). Since under the Phase II rule MS4s may choose either the minimum measures approach or the alternative permit, the Ninth Circuit concluded that the rule would not violate the Tenth Amendment so long as the alternative permit option standing alone did not violate the Tenth Amendment's federalism guarantees. App. 20.

The court found that the alternative permit option did not offend Tenth Amendment principles because it did not compel MS4s to regulate third parties. The court recognized that the Phase I rule application requirements, which served as the application requirements under the alternative permit option, did require an MS4 to provide information concerning proposed ordinances or other regulatory measures. App. 20. But the court found that those application requirements did not "specif[y] the contents of the permit that will result from the application process." App. 20. Thus, "nothing in [the Phase I permit application requirements] will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties." App. 21. In further support for its conclu-

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clear statement and Tenth Amendment issues. Judge Tallman continued to dissent on other issues. No judge of the court of appeals requested a vote on the petition for en banc rehearing.

sion on this point, the Ninth Circuit noted that EPA had in fact already offered the Phase I cities at issue in *City of Abilene* "an option for obtaining permits that would not have involved . . . regulating third parties." App. 21. The court of appeals concluded that "by presenting the option of seeking a permit under [the Phase I permit application requirements], the Phase II rule avoids any unconstitutional coercion." App. 21-22.

REASONS FOR DENYING THE PETITION

The Texas Cities contend that the Phase II rule violates the Tenth Amendment because the alternative permit option requires MS4 operators to regulate third parties. The decision of the court of appeals creates no conflict of authority or important, unresolved question of law on this point, however. Both the Ninth Circuit, in this case, and the Fifth Circuit, in the *City of Abilene* case, have held that there is no Tenth Amendment violation when EPA provides MS4s with a compliance alternative that does not require MS4s to regulate third parties. The Texas Cities do not dispute this principle. Instead, the Texas Cities simply disagree with the court's finding that the Phase II rule provides MS4s with such an alternative. However, the Texas Cities invoke no interpretive principles in support of their reading of the regulation, and the plain language of the regulation is contrary to their position.

The Texas Cities also contend that the Phase II rule violates the clear statement canon of construction that governs when a statutory interpretation raises serious constitutional questions concerning the balance of authority between the federal and state governments. There is, however, no conflict of authority or important, unresolved question of federal law on this point either. The court of appeals applied the same decision of this Court – *SWANCC* – that the Texas Cities argue that

this Court should apply. Because the availability of the alternative permit option eliminates any purported Tenth Amendment concern, the court of appeals correctly decided that there was no serious constitutional question and thus that no clear statement was necessary. Moreover, the canon provides that statutes should be interpreted to avoid constitutional problems. The court of appeals' decision to uphold EPA's interpretation, which avoids any Tenth Amendment concerns by providing a compliance alternative that does not require MS4s to regulate third parties, is thus fully consistent with the canon.

In addition, the Texas Cities now argue, for the first time in this petition for writ of certiorari, that decisions of this Court obliged EPA to provide additional information about the compliance alternatives available to MS4s under the Phase II rule so that MS4 operators could "voluntarily and knowingly" choose between the alternatives. Because the Texas Cities never raised this argument in the proceedings in the court of appeals, the argument is not properly before this Court.

I.

THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' FINDING THAT THE PHASE II RULE DOES NOT VIOLATE THE TENTH AMENDMENT BECAUSE THE RULE PROVIDES A COMPLIANCE ALTERNATIVE THAT DOES NOT REQUIRE MS4 OPERATORS TO REGULATE THIRD PARTIES

In a careful application of this Court's jurisprudence, the Ninth Circuit agreed with the Fifth Circuit in holding that there is no Tenth Amendment violation if EPA offers MS4s a compliance alternative that does not require them to regulate third parties. No court has held otherwise, and the Texas Cities do not challenge that holding in this petition.

Instead, the Texas Cities contend that the Phase II rule violates the Tenth Amendment because the alternative permit option in fact requires MS4s to regulate third parties. Pet. at 27-30. According to the Texas Cities, because certain parts of the relevant regulations for the alternative permit option require that the MS4 provide information about proposed ordinances or other regulatory mechanisms in the permit application, the permits themselves must include ordinances or other similar regulatory mechanisms. *Id.* The court of appeals found to the contrary, and for several reasons this issue does not merit review by this Court.[7]

First, there is no conflict in authority or important, unresolved issue of law on this point. The Texas Cities' position is simply an argument that certain regulations mean something other than what their plain language states and what the agency charged with their interpretation says they mean. The Texas Cities admit that what they seek is correction of a purported "mistake," Pet. at 27, and simple correction of a mistake is not a sufficient ground for certiorari. The Texas Cities invoke no interpretive principles and cite only two cases – neither of which is a decision of this Court, and one of which is discussed solely for the purpose of arguing that it does not govern here.[8] Pet. at 27-30.

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[7] The Texas Cities state that the rule "potentially affects more than 50,000 State and local governmental entities in the nation." Pet. at 27; *see also* Pet. at 14. However, the Texas Cities do not cite any source for this 50,000 figure. The rule itself identifies approximately 5,700 cities or counties actually or potentially subject to the rule. Phase II Pream. & R., 64 Fed. Reg. at 68812-37.

[8] The Texas Cities do suggest that EPA's interpretation caused the court of appeals to "misapply" *SWANCC* because both the minimum measures option and the alternative permit option allegedly require MS4s to regulate third parties, so that the rule raises "significant federalism issues." Pet. at

Second, the Texas Cities' position on the merits is not correct. The plain language of the relevant statute indicates that the Phase I rule provisions were to establish "regulations setting forth the permit application requirements" for large and medium MS4s. 33 U.S.C. § 1342(p)(4)(A) & (B), App. 95-96 The Phase I rule does exactly that: establish permit application requirements. *See, e.g.*, 40 C.F.R. 122.26(d), NRDC App. 1 (captioned "Application requirements for large and medium municipal storm sewer systems"). The court of appeals found that these regulations, which now also serve as the application requirements for the alternative permit option under the Phase II rule, did not "specif[y] the contents of the permit that will result from the application process." App. 20. As a result, "nothing in [the permit application requirements] will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties." App. 21. Citing *City of Abilene*, the court of appeals also noted that EPA has in fact already offered permits to MS4s that do not require the MS4s to regulate third parties. EPA did so, of course, under the Phase I permit application requirements that now apply to Phase II MS4s under the alternate permit option.

Additional support for finding of the court of appeals is found in the text of the regulations. The regulations give the permitting authority the power to excuse an MS4 from certain application requirements – including the requirement to describe the illicit discharge ordinance – if those requirements are not applicable or practicable, as they would not be for an alternative permit based on numeric effluent limits. 40 C.F.R. § 122.26(d)(2)(viii), NRDC App. 10. Moreover, the Phase II rule

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30. As noted in section II.A below, however, the interpretation upheld by the court of appeals does not *create* a federalism issue, but in fact *eliminates* any alleged federalism issue, since the alternative permit option allows MS4s to avoid regulating third parties.

expressly provides that an MS4 applying for an alternative permit need not demonstrate its legal authority to enact such ordinances. 40 C.F.R. § 122.33(b)(2)(ii), NRDC App. 11-12.

The exceptions to the application requirements found in 40 C.F.R §§ 122.26(d)(2)(viii) and 122.33(b)(2)(ii) are consistent with EPA's statement, in the preamble to the Phase II rule, that MS4 operators seeking alternative permits do not need to provide information concerning such program requirements if they seek an alternative permit. App. 159. That agency interpretation of its own regulations is entitled to deference. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (administrative interpretation is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation"). These exceptions are also, of course, consistent with the fact that the alternative permit option does not require MS4s to regulate third parties.

II.

THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE PHASE II RULE IS CONSISTENT WITH THE CLEAR STATEMENT CANON OF CONSTRUCTION THAT GOVERNS WHEN A STATUTORY INTERPRETATION RAISES SERIOUS FEDERALISM QUESTIONS

The Texas Cities argue that the Phase II rule is inconsistent with the canon of construction that requires a clear statement of congressional intent for statutory interpretations that raise serious constitutional issues regarding the balance of federal and state authority. Pet. at 16-17. Though the Texas Cities contend that the court of appeals' rejection of their clear statement challenge presents an issue of "immense importance" and constitutes a "radical departure from settled law," Pet. at 13, the court of appeals was able to resolve the challenge easily through a simple and correct application of the decision of this

Court – *SWANCC* – upon which the Texas Cities themselves rely.

A. The Court of Appeals Applied the Same Authority – *SWANCC* – that the Texas Cities Assert This Court Should Apply and Correctly Held That the Phase II Rule Is Fully Consistent with the Clear Statement Canon

The Texas Cities contend that EPA lacked statutory authority under *SWANCC*. *SWANCC* stands for the proposition that statutes should be interpreted to avoid significant constitutional problems unless such an interpretation is plainly contrary to the intent of Congress. 531 U.S. at 173, 174.

The court of appeals held the rule to be a valid exercise of EPA's statutory authority under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). App. 16 n.18. However, to address the Texas Cities' argument that *SWANCC* governed, the Ninth Circuit also examined whether *SWANCC* invalidated the rule. *Id.* Similarly, in *City of Abilene*, the Fifth Circuit determined whether *SWANCC* invalidated the MS4 permits at issue in that case. 325 F.3d at 660-61. Both courts concluded that *SWANCC* did not invalidate EPA's actions. Given that the only two courts to examine this issue applied the same legal authority that the Texas Cities contend that this Court should apply and reached the same conclusion, the Texas Cities have no grounds to assert the existence of a conflict in authority or an unresolved question of law as a basis for certiorari.

Because there is no conflict of authority or unresolved question of law, the Texas Cities' position is simply that the court of appeals misapplied *SWANCC*. But the Ninth Circuit's holding that the Phase II rule did not violate the clear statement canon was correct. The court of appeals found that the Phase II rule did not present any serious constitutional problems be-

cause the existence of the alternative permit option eliminated any purported Tenth Amendment concerns. App. 16, n.18. As noted above, the Fifth Circuit agrees that there is no Tenth Amendment problem when EPA provides a compliance alternative that does not require MS4s to regulate third parties, and no court has disagreed.

The clear statement canon of construction only governs, however, when there *is* a serious constitutional issue. Accordingly, in the absence of a serious constitutional issue, the court of appeals correctly determined that the canon did not apply, and there was no need for a special clear statement authorizing the Phase II rule's choice of compliance alternatives. App. 16 n.18.

In particular, the canon applies in situations where the statutory interpretation at issue alters the traditional balance of federal and state authority. *SWANCC*, 531 U.S. at 173. The court of appeals found, however, that the Phase II Rule maintained, rather than altered, the existing balance of federal-state authority, given that (1) EPA's authority to regulate MS4s was established over a quarter of a century ago, and (2) EPA promulgated the Phase I rule over a decade ago. App. 16, n.18.

The court also noted that, "even if a clear statement of congressional intent were necessary, § 402(p) of the Clean Water Act is replete with clear statements that Congress intended EPA to require MS4s either to obtain . . . permits or to stop discharging stormwater."[9] *Id.*

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[9] Applying *SWANCC*, the Fifth Circuit found that the Clean Water Act provided clear statements granting EPA discretion to impose permit conditions similar to those in the minimum measures. *City of Abilene*, 325 F.3d at 661. The Fifth Circuit cited Clean Water Act sections 402(p)(3)(B)(ii) and (iii), which provide that MS4 permits include "a requirement to effectively prohibit nonstormwater discharges into the storm sewers" and "controls to re-

Indeed, the court of appeals' decision to uphold the rule is fully consistent with the clear statement canon. As this Court has stated, the clear statement canon provides that statutes should be interpreted to avoid significant constitutional problems unless such an interpretation is plainly contrary to the intent of Congress. *SWANCC*, 531 U.S. at 173, 174.

In *New York* v. *United States*, 505 U.S. 144 (1992), this Court applied this affirmative aspect of the canon in a Tenth Amendment context. In that case, the Court confronted two interpretations of a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPA"). Under one interpretation, the statutory provision was a mandate requiring states to enact and enforce a federal regulatory program in violation of the Tenth Amendment. Under the other interpretation, the statute provided a series of compliance alternatives. Applying the clear statement canon, the Court held that the latter interpretation was correct because the former was constitutionally problematic.[10] *Id.* at 170.

The court of appeals' decision here is fully consistent with *New York*. The court of appeals confronted two interpretations of the Phase II rule. Under the Texas Cities' interpretation, the Phase II rule is an unconstitutional reading of EPA's

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duce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques . . . and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(ii) & (iii), App. 94.

[10] In *New York*, the Court ultimately found, of course, that the final alternative under the LLRWPA, the "take title" provision, did not provide a constitutional alternative. 505 U.S. at 176. Unlike the "take title" provision of the LLRWPA, however, the alternative permit option under the Phase II rule is not unconstitutional standing alone, because it allows MS4s to control pollutant discharges without requiring them to regulate third parties.

statutory authority, because, according to the Texas Cities, both the minimum measures option and the alternative permit option require MS4 operators to regulate third parties in violation of the Tenth Amendment. On the other hand, under EPA's interpretation, the rule is a constitutional reading of the statutory authority because the alternative permit option does not require MS4 operators to regulate third parties, and thus the rule offers a choice that does not violate the Tenth Amendment. The clear statement canon of construction requires that the court choose the interpretation that is least constitutionally problematic – EPA's interpretation – and the court of appeals did so. A decision by this Court to reverse the court of appeals' decision and reject EPA's interpretation would be directly contrary to the canon of construction, and thus there is no reason to grant the petition for writ of certiorari on this point.[11]

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[11] Citing *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Texas Cities suggest that the court of appeals' decision "failed to ensure the efficacy of the procedural political safeguards" that protect state and municipal interests. Pet. at 22. The Texas Cities appear to be arguing that the court of appeals somehow ran roughshod over Congress' views on EPA's authority under the relevant statutes. *Id.* at 22-23.

The Texas Cities' invocation of *Garcia* makes no sense, however. Congress, like the court of appeals, declined to invalidate the Phase II rule. Prior to promulgation of the rule, at the behest of a Senator from Texas, Congress directed EPA to report on the proposed rule. Department of Veterans Affairs & Housing and Urban Dev. & Indep. Agencies Approp. Act of 2000, Pub. L. 106-74 § 431, 113 Stat. 1047 (1999) (enacting Hutchison Amend., 145 Cong. Rec. S11445 (Sept. 24, 1999)). Congress received that report when the EPA administrator signed the rule in October 1999 and would have received a copy of the rule itself pursuant to the Congressional Review Act of 1996, 5 U.S.C. § 801(a)(1)(A) (the "Review Act"). Nonetheless, Congress did not use its Review Act authority to invalidate the rule. 5 U.S.C. §§ 801(b)(1) & 802. NRDC respectfully suggests that this Court should not grant certiorari to vacate the rule on a clear statement challenge when Congress itself declined to vacate the rule.

B. Because the Texas Cities Did Not Previously Argue That EPA Had a Duty to Provide Additional Information About the Alternative Permit Option, This Argument Is Not Properly Before This Court

The Texas Cities now contend, for the first time, that the Phase II rule is invalid because EPA had a legal duty to provide additional information concerning the alternative permit option so that MS4 operators could "voluntarily and knowingly" choose between the two compliance options. Pet. at 25 (citing *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-84 (1999); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); *Pennhurst St. Sch. & Hosp.* v. *Haldermann*, 451 U.S. 1, 17-18 (1981)). The Texas Cities did not make this argument before the court of appeals. Thus, it is not properly before the Court. *See, e.g., Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-13 (1998).

Besides, even if the Texas Cities had made this argument before the court of appeals, the three decisions they cite do not concern the Tenth Amendment, so in any event there could be no direct conflict between the holdings in those cases and the Ninth Circuit's decision. *See College Savings Bank*, 527 U.S. at 680-84 (sovereign immunity); *South Dakota*, 483 U.S. at 207 (spending clause); *Pennhurst St. Sch. & Hosp.*, 451 U.S. at 17-18 (spending clause). Moreover, the rule and preamble do give MS4 operators sufficient information to make an informed choice between the minimum measures option and the alternative permit option.[12] *See generally* App. 100-160.

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[12] In addition to the information EPA provided in the preamble to the rule, there is in general great familiarity with numeric effluent limit permits, which are available to MS4s under the alternative permitting option, since permitting authorities have been using numeric effluent limit permits for decades in a wide variety of contexts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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40 C.F.R. § 122.26(d) (excerpts)

(d) *Application requirements for large and medium municipal separate storm sewer discharges.* . . . Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

* * *

(2) *Part* 2. Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) *Source identification.* The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(*1*) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) *Characterization data.* When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(*3*) of this section, the applicant must collect a sample of effluent in accordance with 40 CFR § 122.21(g)(*7*) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(*1*) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at § 122.21(g)(*7*) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(*3*) For samples collected and described under paragraphs (d)(2)(iii)(A)(*1*) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)
Total dissolved solids (TDS)
COD
BOD_5
Oil and grease
Fecal coliform
Fecal streptococcus
pH
Total Kjeldahl nitrogen
Nitrate plus nitrite
Dissolved phosphorus
Total ammonia plus organic nitrogen
Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD_5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(*1*) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(*1*) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from

municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits,

certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are

subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(*1*) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD_5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(*7*)(vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(*1*) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

(v) *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) *Fiscal analysis.* For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements.

The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

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40 C.F.R. § 122.33(b)(2) (excerpts)

§ 122.33 If I am an operator of a regulated small MS4, how do I apply for an NPDES permit and when do I have to apply?

* * *

(2)(i) If you are seeking authorization to discharge under an individual permit and wish to implement a program under § 122.34, you must submit an application to your NPDES permitting authority that includes the information required under §§ 122.21(f) and 122.34(d), an estimate of square mileage served by your small MS4, and any additional information that your NPDES permitting authority requests. A storm sewer map that satisfies the requirements of § 122.34(b)(3)(i) will satisfy the map requirements in § 122.21(f)(7).

(ii) If you are seeking authorization to discharge under an individual permit and wish to implement a program that is different from the program under § 122.34, you will need to comply with the permit application requirements of § 122.26(d)(1) and (2) by March 10, 2003. You do not need to submit the information required by §§ 122.26(d)(1)(ii) and (d)(2) regarding your legal authority, unless you intend for

the permit writer to take such information into account when developing your other permit conditions.

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